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The Federal Commerce and Navigation Powers: Solid Waste Agency of Northern Cook County's Undecided Constitutional Issue

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ARTICLES

THE FEDERAL COMMERCE AND NAVIGATION POWERS: *SOLID WASTE AGENCY OF NORTHERN COOK COUNTY'S* UNDECIDED CONSTITUTIONAL ISSUE

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I. INTRODUCTION

In *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* ("*SWANCC*"),[1] the U.S. Supreme Court decided a statutory question and avoided a constitutional one. The statutory question was whether section 404 of the Clean Water Act ("CWA"), which authorizes the Army Corps of Engineers to exercise permit authority over dredge-and-fill operations in the nation's waters, applies only to waters that are "navigable." The constitutional question was whether Congress has authority under the Commerce Clause of the U.S. Constitution to regulate non-navigable waters.[2] After examining the CWA's language and legislative history, the Court concluded that the CWA does in fact limit the Corps' jurisdiction to "navigable" waters. Hence, it was unnecessary for the Court to decide whether Congress has constitutional authority to regulate non-navigable waters.

This article will examine the constitutional question that the *SWANCC* Court did not decide. This constitutional ques-

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1. Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs, 531 U.S. 159 (2001). Throughout this article, the Solid Waste Agency of Northern Cook County will be referred to by the abbreviation "SWANCC."

2. *See* U.S. CONST. art. I, § 8, cl. 3.

tion involves two different but related federal powers—the power to regulate interstate commerce and the power to protect navigation. Both federal powers are based on the Commerce Clause; indeed, the federal navigation power derives from the federal power to regulate interstate commerce. Nonetheless, the Supreme Court's jurisprudence regarding these two constitutional powers has proceeded along entirely different paths, and the principles governing their application are not the same. That is, the factors governing whether Congress has properly exercised its general commerce powers do not necessarily apply in determining whether Congress has properly exercised its navigation power, and vice versa. This anomaly likely occurred because the courts formulated the federal navigation power early in the United States' constitutional history, when Congress was thought to have very limited commerce powers, and, conversely, fairly recent Supreme Court decisions substantially expanded the general federal commerce power. The Supreme Court has never squarely addressed or resolved these doctrinal anomalies. This article will examine the Supreme Court's jurisprudence regarding the federal commerce and navigation powers and provide suggestions for avoiding, or at least reducing, the inconsistencies between them.

In addition, this article will demonstrate that the Supreme Court's most recent Commerce Clause decisions raise questions concerning the constitutionality of some federal environmental laws. The Court has recently scaled back the federal commerce power, holding that it applies only to activities substantially affecting interstate economic interests. This judicial trend raises questions about the sustainability of federal environmental laws that Congress enacted primarily, if not wholly, for environmental, rather than economic, purposes. Although *SWANCC* did not decide the constitutional question, the Court's constitutional analysis guided its statutory analysis of the CWA, raising new questions concerning the constitutionality of some federal environmental laws. This article will conclude that most federal environmental laws are unlikely to be affected by the Supreme Court's modern Commerce Clause jurisprudence, but that some environmental laws, notably the Endangered Species Act, are based on an assumption of congressional power that may not be supported by the Court's most recent Commerce Clause deci-

sions.

This article will follow the following format. Part II will briefly describe the Supreme Court's decision in the *SWANCC* case and demonstrate that the decision apparently blurs the distinction between Congress's general commerce powers and its power to regulate navigation. Part III will focus on Congress's general commerce powers and demonstrate how the Supreme Court has recently provided for a more rigorous scrutiny of congressional legislation adopted pursuant to such powers, in order to preserve the states' traditional authority to regulate essentially local matters. Part IV will focus on Congress's navigation power, and demonstrate that this power is governed by different principles than apply to its general commerce power, which has created anomalies regarding the federal government's power under the Commerce Clause that should be recognized and reconciled in future cases. Finally, Part V will describe how the Supreme Court's recent decisions regarding the federal commerce and navigation powers raise questions concerning the constitutionality of some federal environmental laws, and will conclude that most such laws are likely to survive facial challenges but that the fate of others is less clear.

II. THE *SWANCC* DECISION

SWANCC is a consortium of small cities and villages located near Chicago, Illinois, charged with developing a permanent disposal site for non-hazardous solid waste. SWANCC purchased a 533-acre parcel of property that once served as a sand and gravel mining site. During certain times of the year, small ponds form on the site. After acquiring the necessary permits under Illinois law to operate the disposal site, SWANCC applied to the Army Corps of Engineers for a permit under section 404 of the Clean Water Act. Section 404 authorizes the Corps to issue permits for the discharge of dredge-and-fill materials into "navigable waters,"[3] which is defined in section 502(7) as "waters of the United States."[4]

Prior to SWANCC's application, the Army Corps of Engineers adopted a regulation providing that "waters of the

3. 33 U.S.C. § 1344(a) (2001).
4. *Id.* at § 1362(7).

United States," as used in section 502(7), are those that fall within the traditional jurisdiction of the United States, which generally are navigable waters or waters that have a nexus to navigable waters used for interstate commerce.[5] In 1977, the Corps amended its definition of "waters of the United States" to include "intrastate" waters and "wetlands" whose use may affect interstate commerce; thus, the regulation applies irrespective of whether the waters are navigable.[6] In 1986, to "clarify" its regulations, the Corps adopted a preamble stating that "waters of the United States" also includes waters that "are or would be used as habitat" by "migratory birds."[7] This rule, generally referred to as the migratory bird rule, applies to all waters inhabited by migratory birds, regardless of whether the waters are navigable. In effect, the Corps' regulations apply to all wetlands inhabited by migratory birds irrespective of traditional considerations of navigability.

In the *SWANCC* case, the Army Corps of Engineers concluded that the consortium's proposed waste disposal site was a habitat for migratory birds and denied the permit because of the potential harm to the species. SWANCC brought an action challenging the permit denial, arguing that the migratory bird rule exceeded the Corps' authority under both the CWA and the Commerce Clause of the U.S. Constitution.[8] The U.S. Court of Appeals for the Seventh Circuit affirmed the district court's grant of summary judgment for the Army Corps of Engineers and held that the migratory bird rule falls within the scope of both the CWA and the Commerce Clause.[9] According to the Seventh Circuit, the Corps' interpretation of

5. The regulation, adopted in 1974, defined "waters of the United States" as those "which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce." 33 C.F.R. § 209.120(d)(1) (1974). The regulation also provided that "[i]t is the water body's capability of use by the public for purposes of transportation or commerce which is the determinative factor." *Id.* at § 209.260(e)(1).

6. 33 C.F.R. § 328.3(a)(3) (1977). This regulation provides that "waters of the United States" include "waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce . . . ." *Id.*

7. Final Rule for Regulating Programs of the Corps of Engineers, 51 Fed. Reg. 41206, 41217 (1986).

8. *See* U.S. CONST. art. I, § 8, cl. 3.

9. *See* SWANCC v. Army Corps of Eng'rs, 191 F.3d 845 (7th Cir. 1999), *rev'd*, 531 U.S. 159 (2001).

its authority under the CWA and the Commerce Clause was "reasonable" and thus entitled to deference because the CWA "reaches as many waters as the Commerce Clause allows," and Congress's power under the Commerce Clause extends to migratory birds that cross state lines.[10]

The Supreme Court, in a five-to-four decision, reversed the Seventh Circuit decision, holding that the migratory bird rule exceeded the Army Corps of Engineers' authority under the CWA.[11] The majority opinion, authored by Chief Justice Rehnquist, reasoned that Congress, in enacting section 404, intended only to assert its "traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made."[12] The Court held that although the *Chevron* doctrine[13] requires judicial deference to reasonable administrative statutory interpretation, such deference was not appropriate where, as in *SWANCC*, the administrative interpretation would result in a "significant impingement of the States' traditional and primary power over land and water use"[14] and would allow "federal encroachment upon a traditional state power."[15] The Court expressed reluctance to uphold interpretations of congressional legislation that would invoke the "outer limits of Congress's power" without a "clear indication" of Congress's intent.[16] Invoking its "prudential desire not to needlessly reach constitutional issues,"[17] the Court concluded that the CWA was not intended to apply to "nonnavigable, isolated, intrastate waters."[18] Since the migratory bird rule applied regardless of whether the waters are navigable or have a nexus with navigability, the rule exceeded the Corps' authority under section 404 as applied to SWANCC's proposed waste disposal site.[19]

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10. *See SWANCC*, 191 F.3d at 851-52.

11. *See SWANCC*, 531 U.S. at 159.

12. *Id.* at 168 n.3, 172 (explaining that Congress did not intend to "exert anything more than its commerce power over navigation").

13. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

14. *SWANCC*, 531 U.S. at 174.

15. *Id.* at 173.

16. *See id.* at 172.

17. *Id.*

18. *Id.*

19. *Id.* at 174. Addressing other issues of statutory interpretation, the Court held that judicial deference should not be accorded to the Corps' subsequently-adopted migratory bird rule, that Congress had not "acquiesced" in the

Earlier, the Supreme Court ruled in *United States v. Riverside Bayview Homes, Inc.*[20] that the Corps has jurisdiction under section 404 over wetlands "adjacent" to navigable waters, but expressly refrained from deciding whether the Corps' jurisdiction extended to wetlands "isolated" from navigable waters.[21] Since the small seasonal ponds in *SWANCC* had no connection with navigable waters and thus were isolated, *SWANCC* resolved the question left unanswered in *Riverside Bayview*. After *Riverside Bayview* and *SWANCC*, the Corps has authority over "adjacent" wetlands but not "isolated" wetlands. The *SWANCC* Court distinguished *Riverside Bayview* on grounds that the "adjacent" wetlands in that case had a "significant nexus" with navigable waters but the isolated wetlands in *SWANCC* did not. The Court recognized that although the word "navigable" was given limited effect in *Riverside Bayview*, it still must address the navigability component: "It is one thing to give a word limited effect and quite another to give it no effect whatever."[22]

The dissenting opinion, authored by Justice Stevens and signed by three other Justices, argued that the goals of federal water regulation during the twentieth century "shift[ed] away from an exclusive focus on protecting navigability and toward a concern for preventing environmental degradation."[23] According to Justice Stevens, Congress has long been regarded as having sovereign authority over navigable waters and has often exercised such authority,[24] which explains why Congress limited the Corps' jurisdiction in section 404 to "navigable waters." But, Justice Stevens argued, the phrase "navigable waters" is defined in the CWA as "waters of the United States" and thus applies to all waters in the nation irrespective of their navigability.[25] Justice Stevens noted that

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migratory bird rule that was subsequently added to the Corps' regulations, and that section 404(g) of the CWA, 33 U.S.C. § 1344(g)—which provides for state administration of certain navigable waters—does not affect the proper interpretation of the Corps' section 404 authority. *See id.* at 170-74.

20. 474 U.S. 121 (1985).

21. *Id.* at 131-32 n.8. The Army Corps of Engineers has adopted a regulation providing that "adjacent" waters are those "bordering, contiguous, or neighboring" navigable waters. 40 C.F.R. § 230.3(b) (2001).

22. *SWANCC*, 531 U.S. at 172.

23. *Id.* at 178 (Stevens, J., dissenting).

24. *See id.* at 177-81 (citing Rivers and Harbors Act of 1899, § 13, 30 Stat. 1152 (1899), and The Daniel Ball, 77 U.S. (10 Wall.) 557 (1870)).

25. *See SWANCC*, 531 U.S. at 180-81.

the goals of the CWA have nothing to do with navigation or navigability.[26] Therefore, he concluded that Congress intended to exercise the full scope of its commerce power by regulating all waters within the United States.[27] According to Justice Stevens, the migratory bird rule falls within Congress's power to regulate commerce and hence within the scope of the CWA.

The *SWANCC* Court held only that the CWA did not authorize the Army Corps of Engineers to adopt the migratory bird rule since the rule applied irrespective of whether the waters were navigable, and refrained from reaching the constitutional question whether Congress has constitutional authority to regulate such waters. This constitutional issue, however, was at the heart of the Court's statutory analysis. The majority opinion construed the CWA to avoid the constitutional question, and the dissenting opinion argued that the statute should not be construed this way because the majority's constitutional analysis was wrong.

The constitutional disagreement between the majority and dissenting opinions reflects a fundamental difference between two discrete but related questions concerning the scope of Congress's authority to regulate water under the Commerce Clause. The first question concerns the scope of Congress's power to regulate activities affecting "commerce" crossing state lines, particularly activities of a non-economic nature. The second question is whether Congress has constitutional power to regulate waters that are not navigable and have no significant links with navigability. Thus, the first question focuses on Congress's broad authority to regulate all avenues of commerce, and the second on Congress's more limited authority to regulate water. These questions are obviously related because Congress's authority to regulate navigable waters derives from its general powers to regulate commerce under the Commerce Clause.

This article will now consider the constitutional question not decided in *SWANCC* by examining Congress's general commerce and navigation powers in more detail. The Supreme Court's jurisprudence regarding these federal powers has proceeded along different lines, and the standards gov-

26. *See id.*
27. *See id.* at 181-82.

erning their application are fundamentally different. The factors applicable in determining whether Congress has properly exercised its general commerce powers do not necessarily apply in determining whether it has properly exercised its navigation powers. Specifically, the navigability of water—which is the constitutional linchpin of the federal navigation power—is not determinative of whether the regulated activity "substantially affects" interstate commerce, which is the linchpin of the general federal commerce power.[28] In *SWANCC* itself, the majority and dissenting opinions generally focused on Congress's navigation powers rather than its general commerce powers in construing the statutory issue, although the opinions sometimes blurred the distinction between the two.[29]

Although the federal commerce and navigation powers flow from the same source and one derives from the other, the Supreme Court's precedents have treated them differently.

III. THE FEDERAL COMMERCE POWER

A. *Nature of the Power*

The Commerce Clause, which authorizes Congress to regulate commerce among the states,[30] has both active and dormant aspects.[31] The clause affirmatively authorizes Congress to regulate interstate commerce[32] and restrains the states from imposing unreasonable burdens on the free flow of commerce among the states.[33] The restraint on state power, however, is not absolute. The Clause's "dormant" as-

28. *See* United States v. Lopez, 514 U.S. 549 (1995); United States v. Morrison, 529 U.S. 598 (2000).

29. *See, e.g.*, *SWANCC*, 531 U.S. at 173 (citing United States v. Morrison, 529 U.S. 598 (2000) (describing Congress's general authority to regulate interstate commerce)); *Lopez*, 514 U.S. at 549 (1995) (describing Congress's general authority to regulate interstate commerce).

30. Under the Commerce Clause, Congress has the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3.

31. *See Lopez*, 514 U.S. at 554 (1995) (Kennedy, J., concurring); L. Graglia, *United States v. Lopez: Judicial Review Under the Commerce Clause*, 74 TEX. L. REV. 719, 729-30 (1996).

32. *See, e.g.*, NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); Wickard v. Filburn, 317 U.S. 111 (1942).

33. *See* Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573, 579 (1986); Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

pect is based on the premise that the federal government has exclusive authority to regulate interstate commerce; therefore, the states are prohibited from imposing unreasonable burdens only to the extent that Congress has not authorized them.[34] In short, Congress can authorize what the Constitution otherwise forbids. In its active and dormant aspects, the Commerce Clause serves as both a source of federal power and a limitation on state power.

The Commerce Clause literally authorizes Congress only to "regulate" interstate "commerce," which, according to the strict meaning of the term, includes the traffic of goods but not their manufacture or production.[35] Indeed, the Founding Fathers may have understood the term to be limited to the traffic rather than the production of goods; in *The Federalist*, Alexander Hamilton differentiated between commerce, agriculture, and manufacturing, regarding them as three separate activities.[36] The Founding Fathers also believed, however, that the federal power to regulate commerce must be sufficiently flexible to accommodate the nation's changing needs.[37] The economic growth of the American nation in the last century created an increasingly unified national economy, one that increasingly competed with the economies of other nations.[38] In response to these changing economic needs, Congress adopted legislation regulating a broad range of economic activities—communications, railroads and antitrust activities, among others—that were obviously far beyond the comprehension of the Founding Fathers. As the new national economy emerged, the production of goods and services became more closely intertwined with interstate commerce, thus blurring the distinction between production and commerce.

As Congress legislated in response to changing economic conditions, the Supreme Court struggled to define the scope of Congress's commerce power and to determine the appropriate

34. *See, e.g.*, *Lopez*, 514 U.S. at 554; *id.* at 569 (Kennedy, J., concurring).

35. *See generally Lopez*, 514 U.S. at 584 (Thomas, J., concurring).

36. *See* THE FEDERALIST NO. 36, at 224 (Alexander Hamilton). *See also Lopez*, 514 U.S. at 584 (Thomas, J., concurring).

37. *See* THE FEDERALIST NO. 46, at 295, 319 (James Madison) (arguing that "National Government will partake sufficiently of the spirit [of federalism], to be disinclined to invade the rights of the individual States, or the prerogatives of their governments").

38. *See Lopez*, 514 U.S. at 568, 574 (Kennedy, J., concurring).

division of sovereign authority between the federal government and the states. The inquiry, as Justice Cardozo once wrote, is to determine "what is national and what is local in the activities of commerce."[39] The debate, in a broad sense, has been over the proper role of the courts in examining Congress's exercise of its commerce power and in enforcing the constitutional division of power between the federal government and the states. Under one view, the courts are responsible for determining and enforcing the limits of Congress's commerce power, since under *Marbury v. Madison*,[40] the courts have the obligation to adjudicate constitutional questions. This judicial responsibility includes determining whether the federally-regulated activity has sufficient links to interstate commerce to justify the exercise of the federal commerce power. Under another view, the courts generally should defer to Congress's judgments regarding the scope of its commerce powers. Under this view, if an activity, even when otherwise seemingly "local," has some effect on interstate commerce, Congress has broad authority to regulate the activity under its expansive commerce power; questions concerning the scope of the federal commerce power should be resolved through the political process rather than the judicial one. Under the former view, the federal government, unlike states, does not have a general police power. Under the latter view, the federal government—although not having a police power *per se*—nonetheless has virtually equivalent authority under Congress's broad authority to regulate commerce.

The Supreme Court's jurisprudence regarding the federal commerce power falls into three distinct periods of time, during each of which one of the views described above has gained ascendancy.

B. *Pre-New Deal*

During the first period of the Supreme Court's Commerce Clause jurisprudence, which lasted until the New Deal period in the 1930s, the Court broadly construed the federal commerce power, but held that the power was subject to significant limits developed by the courts through their power of ju-

39. *Lopez*, 514 U.S. at 567 (quoting A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 554 (1935)).

40. 5 U.S. (1 Cranch) 137, 176 (1803).

dicial review. In *Gibbons v. Ogden*,[41] Chief Justice John Marshall, writing for the Court, rejected the argument that the power is limited only to traffic; "[c]ommerce, undoubtedly, is traffic, but it is something more—it is intercourse."[42] He cautioned, however, that the power has limits:

> [T]he enumeration of the particular classes of commerce to which the power was to be extended, would not have been made, had the intention been to extend the power to every description. The enumeration presupposes something not enumerated; and that something . . . must be the exclusively internal commerce of a State.[43]

In *Gibbons*, the Court invalidated a permit issued under New York law authorizing exclusive ferry service between New York and New Jersey on grounds that the permit conflicted with, and hence was preempted by, a permit issued to a competitor under authority of federal law.

After *Gibbons*, as congressional economic regulation increased, the Supreme Court clarified the outer limits of Congress's commerce power. In several cases, the Court held that the commerce power extended only to "commerce" and not to "manufacturing" or "production" of goods; the latter activities, the Court ruled, occur solely within a state and hence are beyond Congress's regulatory power.[44] In other cases, the Court held that the federal commerce power applies only to activities that have a "direct" rather than "indirect" effect on interstate commerce.[45] In effect, the "commerce-manufacturing" distinction was a content-based restriction that examined the specific nature of the regulated activity, and the "direct-indirect" distinction was a cause-based restriction that examined the nexus between the regulated activity and its interstate effects. Although some Justices have labeled these dis-

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41. 22 U.S. (9 Wheat) 1 (1824).

42. *Id.* at 189.

43. *Id.* at 194-95.

44. *See, e.g.*, United States v. E. C. Knight Co., 156 U.S. 1, 12 (1895) (distinguishing between "commerce," on the one hand, and "production," "manufacturing," and "mining," on the other); Carter v. Carter Coal Co., 298 U.S. 238, 304 (1936) (distinguishing between "commerce" and "manufacturing").

45. *See* A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 548 (1935) (holding that the wage and hour provision of the National Industrial Recovery Act has "no direct relation" to interstate commerce); Carter v. Carter Coal Co., 298 U.S. 238, 309 (1936) (holding that the federal statute regulating wages and hours of miners had "secondary and indirect" effects on interstate commerce).

tinctions "formalistic"[46]—and regardless of their merits or whether they are appropriate in today's world—the distinctions appear to have been based on notions of literalness and proximate cause that are common methods for judicial interpretation of the law. Although these distinctions were conceptually different in some ways, they fundamentally presupposed that the courts are responsible for determining the proper demarcation between federal and state boundaries regarding regulation of commerce, and that the courts should not simply defer to Congress to make such judgments. Applying these distinctions, the Court sustained Congress's commerce regulations in many instances,[47] but also struck down legislation regulating labor practices,[48] child labor,[49] union membership,[50] and wages and hours.[51]

C. *New Deal, Post-New Deal*

During the second period of the Supreme Court's Commerce Clause jurisprudence, which lasted from the New Deal era of the 1930s until the mid-1990s, the Court adopted a much more lenient standard of review, holding that the federal commerce power encompasses virtually every aspect of national life and that the courts should defer to congressional judgments regarding the exercise of the commerce power. During this period, the Court upheld the federal commerce power if the regulated activity "affects" or "substantially affects" interstate commerce,[52] and applied a "rational basis"

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46. United States v. Lopez, 514 U.S. 549, 569 (1995) (Kennedy, J., concurring); *id.* at 605 (Souter, J., dissenting).

47. *See, e.g.*, Houston, E. & W.T.R. Co. v. United States, 234 U.S. 342 (1914) (upholding Interstate Commerce Commission order fixing railroad rates); Swift & Co. v. United States, 196 U.S. 375 (1905) (upholding application of federal antitrust laws to meat dealers located in a single state).

48. *See* Carter v. Carter Coal Co., 298 U.S. 238, 303-04 (1936) (invalidating congressional act regulating price of coal and wages and hours for miners).

49. *See* Hammer v. Dagenhart, 247 U.S. 251 (1918) (invalidating congressional act prohibiting shipment in interstate commerce of goods manufactured at factories using child labor).

50. *See* Adair v. United States, 208 U.S. 161 (1908) (invalidating congressional act prohibiting discharge of employee because of his union membership).

51. *See* A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 545-48 (1935) (invalidating wage and hour provision of National Industrial Recovery Act).

52. *See, e.g.*, Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 276 (1981) (holding that federal commerce power applies if activity "affects" interstate commerce); Wickard v. Filburn, 317 U.S. 111, 125 (1942)

standard in reviewing congressional judgment.[53] By rejecting the "manufacturing-commerce" and "direct-indirect effects" distinctions and focusing instead on whether the activity "affects" or "substantially affects" interstate commerce, the Court broadened its interpretation of Congress's commerce powers; for example, a "manufacturing" activity that lacks a "direct" effect on interstate commerce nonetheless may substantially "affect" such commerce. Moreover, the rational basis standard of review is highly deferential to congressional judgments because it requires only that the means chosen by Congress are reasonably related to constitutionally permissible ends.[54] Applying this highly deferential standard of review, the Court consistently sustained congressional legislation adopted pursuant to the federal commerce power, upholding, for example, Congress's authority to regulate labor unions,[55] intrastate coal mining,[56] restaurants,[57] and hotels and inns.[58] Indeed, the Supreme Court during this period sustained every congressional regulation that it reviewed under the Commerce Clause. In the Court's view, the federal commerce power appeared unlimited.

The Supreme Court's approach during this period was reflected in its landmark decision in *Wickard v. Filburn*,[59] where the Court sustained the constitutionality of amendments to the Agricultural Adjustment Act of 1938. The amendments restricted the production of homegrown wheat as part of a national program to sustain the market price for wheat. An Ohio farmer who grew wheat for his own consumption on his farm challenged the constitutionality of the amendments, arguing that since he did not sell his wheat in the market, his wheat did not enter the stream of commerce

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(holding that power applies if activity has "substantial economic effect"); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937) (holding that power applies if activity has "close and substantial relation" to interstate commerce).

53. *See, e.g.*, *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. at 276; Maryland v. Wirtz, 392 U.S. 183, 190 (1968); Katzenbach v. McClung, 379 U.S. 294, 303-04 (1964); Preseault v. ICC, 494 U.S. 1, 17 (1990).

54. *See, e.g.*, *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. at 276; Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 262 (1964); *Preseault*, 494 U.S. at 17.

55. *See Jones & Laughlin Steel Corp.*, 301 U.S. at 1.

56. *See Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. at 264.

57. *See Katzenbach*, 379 U.S. at 294.

58. *See Heart of Atlanta Motel, Inc.*, 379 U.S. at 241.

59. Wickard v. Filburn, 317 U.S. 111 (1942).

and its production had no effect on the interstate market. The Court rejected his argument, ruling that—although his wheat may not be an article of commerce—its production nonetheless may affect the interstate market for wheat; the farmer could be encouraged to sell his wheat in the market if prices rose, and, even if he did not sell his wheat, his homegrown production would relieve him from the need to purchase wheat in the market, thus affecting the market.[60]

Although the *Wickard* Court acknowledged that the farmer's homegrown wheat may be "trivial" as applied to interstate commerce, the Court said that his contribution, "taken together with that of many others similarly situated, is far from trivial."[61] Thus, the Court aggregated the production of all producers of homegrown wheat to determine whether their production collectively, even if not individually, affects interstate commerce and hence fell within the federal regulatory power.[62] Under *Wickard's* aggregation principle, Congress can regulate an entire class of producers whose collective product may affect interstate commerce, even though the production of an individual class member will not have this effect. The aggregation principle appears to differ from the Supreme Court's normal constitutional and statutory analysis, which holds that a statute or regulation may be valid as applied to an entire class but nonetheless invalid "as applied" to an individual within the class.[63] In any event, *Wickard's* aggregation principle, coupled with the Supreme Court's deferential "rational basis" standard of review, effectively enabled Congress to regulate virtually all aspects of national life under its commerce power.

In *National League of Cities v. Usery*, decided in 1976, the Supreme Court briefly departed from its post-New Deal era of Commerce Clause jurisprudence, narrowly ruling that the Tenth Amendment of the Constitution, which reserves for the states powers not delegated to the federal government,

60. *See id.* at 128.

61. *Id.* at 127-28.

62. The aggregation principle has been applied in other cases. *See, e.g.*, Hodel v. Indiana, 452 U.S. 314, 324-25 (1981); Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981); Perez v. United States, 402 U.S. 146, 154 (1971); *Katzenbach*, 379 U.S. at 301.

63. *See, e.g.*, Salinas v. United States, 522 U.S. 52, 60-61 (1997); Babbitt v. Sweet Home Chapter of Communities, 515 U.S. 687, 709 (1995) (O'Connor, J., concurring).

limits the scope of congressional power under the Commerce Clause.[64] The *Usery* Court held that the Constitution balances Congress's delegated powers under the Commerce Clause and the states' reserved powers under the Tenth Amendment, thus preventing Congress from impairing the "integral governmental functions" of the states.[65] The Court rejected its earlier view, as expressed in *United States v. Darby*,[66] that the Tenth Amendment expresses the simple "truism" that powers not delegated to the federal government are reserved to the states but that this truism has no substantive effect on constitutional interpretation.[67] Thus, under *Usery*, the Tenth Amendment shield effectively blunted the Commerce Clause sword. Applying this shield, the Court invalidated federal wage and hour standards as applied to the states. In *Garcia v. San Antonio Metropolitan Transit Authority*,[68] however, decided in 1985, the Supreme Court narrowly overturned *Usery* and ruled that the Tenth Amendment, by itself, poses no obstacle to federal regulation under the Commerce Clause. According to the *Garcia* Court, the Founding Fathers indicated that constitutional restraints on the federal commerce power "inhered principally in the workings of the National Government itself," and therefore the states' sovereign interests "are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power."[69]

D. *The* Lopez *and* Morrison *Decisions*

During the third period of the Supreme Court's Commerce Clause jurisprudence, from the mid-1990s to the present, the Court has held that the Commerce Clause imposes substantive limits on the scope of the federal power and that the courts are constitutionally obligated to determine and apply these limits in assessing the validity of congressional leg-

64. Nat'l League of Cities v. Usery, 426 U.S. 833 (1976), overruling Maryland v. Wirtz, 392 U.S. 183 (1968), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

65. *See Usery*, 426 U.S. at 851.

66. United States v. Darby, 312 U.S. 100 (1941).

67. *See id.* at 124; *Usery*, 426 U.S. at 843-44.

68. 469 U.S. 528 (1985).

69. *Id.* at 552.

islation. In *United States v. Lopez*,[70] decided in 1995, the Court struck down the Gun-Free School Zones Act of 1990,[71] which prohibited possession of guns near schools. In *United States v. Morrison*,[72] decided in 2000, the Court struck down a provision of the Violence Against Women Act creating a federal civil remedy for acts of violence against women.[73] Although the Court stated in these cases that it was not significantly departing from its precedents,[74] the Court clearly established a more exacting inquiry into Congress's commerce power legislation than in its post-New Deal cases. Indeed, *Lopez*, *Morrison* and related decisions were the first to strike down congressional legislation adopted under the Commerce Clause since the New Deal era, excepting *National League of Cities v. Usery*, which was overruled in *Garcia*.[75]

The more exacting inquiry mandated by *Lopez* and *Morrison* is manifested in several different ways. First, the Court held that Congress's commerce power applies only to activities that "*substantially* affect" interstate commerce, not those that simply "affect" such commerce.[76] This standard, the Court said, requires a showing of a reasonable nexus between the regulated activity and interstate commerce, rather than

70. 514 U.S. 549 (1995).

71. 18 U.S.C. § 922(q).

72. 529 U.S. 598 (2000).

73. *See* 42 U.S.C. § 13981.

74. *See Lopez*, 514 U.S. at 559 (the conclusion is "consistent with the great weight of our case law"); *Morrison*, 529 U.S. at 608 & n.3.

75. In *New York v. United States*, 505 U.S. 144 (1992), and *United States v. Printz*, 521 U.S. 898 (1997), the Supreme Court held that Congress may not, under its commerce powers, "commandeer" state resources in order to fulfill congressionally-mandated objectives. In *New York*, the Court struck down portions of the Low-Level Radioactive Waste Policy Amendments Act of 1985, 42 U.S.C. § 2021(d)(2)(C), which required the states to "take title" to—and hence dispose of—low level radioactive waste, stating that Congress cannot "simply 'commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'" *New York*, 505 U.S. at 161 (quoting from Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 288 (1981)). In *Printz*, the Court struck down portions of the Brady Handgun Violence Prevention Act, 18 U.S.C. § 922(s)(2), which required local law enforcement officials to conduct background checks of persons applying for handguns. The Court in both cases held that Congress has broad authority to pursue federal objectives under its commerce powers, in that it can preempt state laws that obstruct such objectives and can encourage voluntary state compliance with federal objectives through its spending powers, but that Congress may not direct the states to adopt policies to achieve these objectives, or mandate utilization of state resources for this purpose.

76. *See Lopez*, 514 U.S. at 559 (emphasis added).

simply a "but-for" connection.[77] Second, the Court ruled that "commerce," as used in the Commerce Clause, refers to "economic activity" and thus does not embrace non-economic activity.[78] According to the Court, its precedents—even those such as *Wickard v. Filburn* that stretched the Commerce Clause to its limits—involved economic activity.[79] Therefore, the Court said, the Commerce Clause does not extend to such non-economic activities as gun possession near schools, as in *Lopez*, or gender-based acts of violence, as in *Morrison*.[80] Third, the Court said that congressional findings supporting a "nexus" between the regulated activity and interstate commerce are not given weight if, as in *Morrison*, the findings employ a constitutionally impermissible standard different from the "substantially affects" standard adopted by the Court.[81] Finally, the Court stated that although it did not reject *Wickard's* aggregation principle, it would be disinclined to apply the principle in cases involving non-economic activities.[82] Thus, by requiring a stronger nexus between the regulated activity and interstate commerce and by defining "commerce" to mean economic activities, the Court established a more rigorous standard of Commerce Clause review than in previous cases.

The Supreme Court justified this higher standard of scrutiny on grounds that it has a constitutional obligation under *Marbury v. Madison* to adjudicate constitutional ques-

77. *See id.* at 562 ("requisite nexus with interstate commerce") (citing United States v. Bass, 404 U.S. 336, 347 (1971)); *Morrison*, 529 U.S. at 613 (rejecting "but-for reasoning").

78. *See Lopez*, 514 U.S. at 560 ("economic activity"); *Morrison*, 529 U.S. at 611 ("economic endeavor").

79. *See Lopez*, 514 U.S. at 560.

80. The *Lopez* Court rejected the Government's argument that the possession of guns near schools affected interstate commerce because violent crime affects national productivity by increasing public costs, discouraging travel, and impairing the educational process. *See id.* at 563-64. The Court stated that the link between gun possession and interstate commerce was "attenuated" and would result in a "general police power" for the federal government and that such a power has not been constitutionally delegated. *See id.* at 529; *Morrison*, 529 U.S. at 612-13.

81. *See Morrison*, 529 U.S. at 614-16.

82. *See Lopez*, 514 U.S. at 561; *Morrison*, 529 U.S. at 611 n.4, 613, 617 ("We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce.").

tions, rather than simply defer to congressional judgments.[83] As the Court noted, *Marbury* held that the courts rather than Congress have the responsibility "to say what the law is."[84] The question, in the Court's mind, involves a judicial function rather than a legislative one, and therefore belongs in the judicial rather than the political arena. By adopting this higher standard of review, the Court effectively abandoned the less-exacting "rational basis" standard that had previously governed the Court's Commerce Clause analysis.

The constitutional importance of this higher level of scrutiny, the *Lopez/Morrison* Court said, is that it protects the constitutional system of checks and balances, including a division of the nation's sovereign power between the federal government and the states.[85] This constitutional division of power preventing the centralization of a single national power, the Court stated, was adopted by the Founding Fathers to secure and protect the liberty of the nation's citizens.[86] According to the Court, if the judiciary did not carry out its responsibility of limiting the federal commerce power, Congress would have virtually unfettered authority to regulate all aspects of national life; it could, for example, regulate such inherently local matters as family law, including marriage, divorce, and child custody.[87] If Congress possessed such broad powers, the Court stated, Congress could exercise a general police power to regulate the conduct of the nation's citizens, a power that has not been constitutionally delegated. The Court chastised the dissenting opinions for their failure to articulate any practical limits to the federal commerce power, and for their "obliteration" of the distinction between "what is national and what is local."[88] Although the Court did not overtly adopt *Usery*'s balancing approach—which balanced federal and state sovereign powers under the Commerce Clause and the Tenth Amendment—the effect was

83. *See Lopez*, 514 U.S. at 566; *Morrison*, 529 U.S. at 616.

84. *Lopez*, 514 U.S. at 566, (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)); *Morrison*, 529 U.S. at 616 (also citing *Marbury*). *See also* United States v. Nixon, 418 U.S. 683, 703 (1974).

85. *See Morrison*, 529 U.S. at 616 n.7; *Lopez*, 514 U.S. at 576 (Kennedy, J., concurring).

86. *See Lopez*, 514 U.S. at 575-76 (Kennedy, J., concurring); *Morrison*, 529 U.S. at 616 n.7.

87. *See Lopez*, 514 U.S. at 564; *Morrison*, 529 U.S. at 615-16.

88. *Lopez*, 514 U.S. at 557. *See also Morrison*, 529 U.S. at 619 n.8.

much the same, in that the Constitution limits federal power to ensure that the nation's sovereign power is shared by the states.

The dissenting Justices in *Lopez* and *Morrison* argued that the majority opinions had overturned decades of settled jurisprudence dating from the New Deal era and were reminiscent of the Court's decisions striking down federal and state laws for their failure to comport with economic laissez-faire principles thought to be imbedded in the Constitution.[89] According to the dissenting opinions, Congress is better qualified than the courts to determine the need for legislation to address the nation's social and economic problems; therefore, the question is a political one rather than a judicial one.[90] Therefore, the Court generally should defer to congressional judgments on these political issues and continue to apply the less exacting "rational basis" standard in reviewing such congressional judgments.[91] In his dissenting opinion in *Morrison*, Justice Souter maintained that "politics, not judicial review, should mediate between state and national interests" and that "the Constitution remits" conflicts between federal and state powers "to politics,"[92] appearing to suggest that the courts have virtually no role in adjudicating the reach of the federal commerce power. Moreover, the dissenting opinions argued that an activity not strictly economic can have a significant effect on commerce among the states, particularly if, as the *Wickard* Court held, the activities of an entire class are aggregated to determine their effect; therefore, "commerce," as used in the Commerce Clause, should be construed broadly rather than narrowly.[93]

After *Lopez* and *Morrison*, the Supreme Court's Commerce Clause jurisprudence has to some extent reverted to what it was before the Court liberalized its analysis during the New Deal period. That is, the *Lopez/Morrison* Court struck down congressional legislation perceived as beyond Congress's commerce powers, just as the Court occasionally

89. *See Lopez*, 514 U.S. at 603 (Souter, J., dissenting), 615 (Breyer, J., dissenting); *Morrison*, 529 U.S. at 628 (Souter, J., dissenting), 655 (Breyer, J., dissenting).

90. *See, e.g., Lopez*, 514 U.S. at 611 (Souter, J., dissenting); *Morrison*, 529 U.S. at 647-51 (Souter, J., dissenting).

91. *See Morrison*, 529 U.S. at 618 (Breyer, J., dissenting).

92. *Id.* at 647, 649 (Souter, J., dissenting).

93. *See id.* at 641-46 (Souter, J., dissenting).

did in the pre-New Deal era. The *Lopez/Morrison* Court, however, did not altogether embrace the Court's constitutional methodology in the pre-New Deal era. That is, it did not apply the distinction between "commerce" and "manufacturing," nor between "direct" and "indirect" effects, on interstate commerce. Rather, the *Lopez/Morrison* Court applied much of the constitutional methodology of the post-New Deal Court, by considering whether the regulated activity "affected" or "substantially affected" interstate commerce. Thus, the Court considered the nexus between congressional means and ends rather than applying the "formalistic" distinctions of the past.

The *Lopez/Morrison* Court changed recent constitutional methodology in two significant respects without actually overruling any of its Commerce Clause precedents. First, and most obviously, the Court ruled that the word "commerce" in the Commerce Clause connotes economic activity, and cannot extend beyond that limited connotation to include non-economic activity. Moreover, the Court said, the aggregation principle that generally applies in Commerce Clause cases—which often is essential in sustaining congressional regulation—may not apply to congressional regulation of non-economic activity. Manifestly, if aggregation of economic activities is necessary to bring such activities within the reach of Congress's commerce powers, a non-aggregation approach as applied to non-economic activities will often result in such activities falling outside the scope of the commerce power.

Second, the *Lopez/Morrison* Court ruled that the courts have the fundamental responsibility of examining the nexus between congressional means and ends, and determining whether Congress is actually regulating a subject that has national, rather than local, consequences. The Court will not simply defer to congressional judgments, nor be bound by congressional findings. Commerce Clause analysis thereby implicates not only the division of sovereign power between the federal government and the states, but also the separation of powers between the judicial and legislative branches.[94] Thus, under *Lopez* and *Morrison*, the responsibility to deter-

94. In a similar vein, the Supreme Court recently held that the courts rather than Congress are responsible for determining the scope of Congress's power to regulate the free exercise of religion under the First Amendment. *See* City of Boerne v. Flores, 521 U.S. 507 (1997).

mine the federal and state constitutional roles rests in the judicial rather than the legislative realm.

Lopez and *Morrison* promise to have a major effect on constitutional interpretation of Congress's environmental laws. These decisions hold that the federal commerce power applies only to activities having substantial economic impacts. Congress's environmental laws, on the other hand, generally have been adopted for environmental rather than economic purposes. Before addressing this significant constitutional question, this article will examine a related principle—the federal power to regulate navigation—that is relevant in measuring the breadth of the federal power to regulate commerce in the nation's waterways.

IV. THE FEDERAL NAVIGATION POWER

A. *Nature of the Power*

Under its navigation power, Congress has authority to regulate navigable waters that are used as the highways of commerce among the states.[95] This power derives from the Commerce Clause, which authorizes Congress to regulate commerce among the states.[96] As the Supreme Court explained, navigable waters are the "public property of the nation, and subject to all the requisite legislation by Congress."[97] Therefore, the federal government possesses a sovereign navigation "servitude" or "easement" in navigable waters that is paramount to the rights of others.[98]

The Supreme Court has substantially broadened Congress's authority to regulate navigable waters in order to protect navigation interests. First, the Court has held that the federal navigation power applies not only to waters that are

95. *See* Kaiser Aetna v. United States, 444 U.S. 164, 170-80 (1979); United States v. Grand River Dam Auth., 363 U.S. 229 (1960); United States v. Twin City Power Co., 350 U.S. 222 (1955); Oklahoma *ex rel.* Phillips v. Guy F. Atkinson Co., 313 U.S. 508 (1941); United States v. Appalachian Elec. Power Co., 311 U.S. 377 (1940); United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53, 69 (1913); United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690 (1899); Gibbons v. Ogden, 22 U.S. (9 Wheat) 1, 89 (1824).

96. *See* U.S. CONST. art. I, § 8, cl. 3. *See also Appalachian Elec. Power Co.*, 311 U.S. at 404; *Chandler-Dunbar Water Power Co.*, 229 U.S. at 63.

97. *Chandler-Dunbar Water Power Co.*, 229 U.S. at 63.

98. *See id.* ("servitude"); *Kaiser Aetna*, 444 U.S. at 178 ("servitude"); United States v. Gerlach Live Stock Co., 339 U.S. 725, 736 (1950) ("easement").

actually navigable, but also to waters that are "susceptible" of navigation, meaning that they need only be capable of supporting navigation by physical improvements.[99] The purpose of the navigation power, the Court has reasoned, is to protect the "availability" of the nation's waterways to serve navigation purposes, regardless of whether they currently serve such purposes.[100] In addition, the federal navigation power applies to *all* the nation's navigable waters, irrespective of whether they are part of a state's internal waters.[101] Thus, the navigation power applies to navigable waters that are located wholly within a state, not just interstate waters; the assumption is that activities in internal navigable waters may affect interstate commerce as much as activities in waters flowing directly between states. Finally, the federal navigation power applies not only to navigable waters, but also to non-navigable tributaries of navigable waters.[102] Since the purpose of the federal power is to protect the highways of interstate commerce, the tributaries that influence the highways' capacity to bear commerce also fall within the scope of the power.

The federal navigation power, as a servitude or easement, has two important limiting characteristics in the United States' constitutional system. First, and most importantly, this federal power limits the states' historic authority to regulate their water resources.[103] The nature of the states' sovereign interests in water has been spelled out in a series of

99. The Daniel Ball, 77 U.S. (10 Wall.) 557, 563 (1870) (explaining that rivers are regarded as "public navigable rivers in law which are navigable in fact," and they are "navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water"). *See also Appalachian Elec. Power Co.*, 311 U.S. at 406; The Montello, 87 U.S. (20 Wall.) 430, 439 (1874).

100. *See Appalachian Elec. Power Co.*, 311 U.S. at 406-07.

101. *See, e.g., Kaiser Aetna*, 444 U.S. at 172; Utah v. United States, 403 U.S. 9, 10 (1971); *Appalachian Elec. Power Co.*, 311 U.S. at 404-05.

102. *See, e.g.*, United States v. Grand River Dam Auth., 363 U.S. 229 (1960); Oklahoma *ex rel.* Phillips v. Guy F. Atkinson Co., 313 U.S. 508 (1941); United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690 (1899). The Supreme Court has also held that the federal navigation power extends to artificial bodies of water lying within a state, such as man-made canals that are used for transporting commerce between ports in different states. *See In re* Boyer, 109 U.S. 629 (1884); *Kaiser Aetna*, 444 U.S. at 172 n.7.

103. *See* United States v. Texas, 339 U.S. 707, 717 (1950); United States v. Oregon, 295 U.S. 1, 14 (1935).

Supreme Court decisions stretching from the early nineteenth century to the present; these decisions, which have never been overruled, form the foundation of much jurisprudence defining the federal and state roles in water regulation.[104] Under these decisions, the states are held to have sovereign authority over their navigable waters. This authority derives directly from the King's sovereignty under the English common law. That is, the King's sovereign authority over navigable waters was transferred directly to the original thirteen states at the time of the American Revolution, and thus the original states possessed full sovereignty over such waters, subject only to powers surrendered in the Constitution to the federal government, predominantly including the federal power to regulate navigation.[105] Under the equal footing doctrine, new states were admitted to statehood on the same terms and conditions as—that is, on an equal footing with—the original thirteen states; hence, they acquired the same sovereign authority over their navigable waters as the original states.[106] Thus, the states have sovereign authority over their navigable waters, subject only to the federal government's constitutionally-delegated powers, including its navigation power. The equal footing doctrine provides the constitutional basis for the states to regulate and control water rights.[107]

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104. *See, e.g.*, Oregon *ex rel* State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363, 372-74 (1977); United States v. Texas, 339 U.S. at 717; United States v. Oregon, 295 U.S. at 14; Shively v. Bowlby, 152 U.S. 1, 26-27, 49-50 (1894); Hardin v. Jordan, 140 U.S. 371, 381-82 (1891); Barney v. Keokuk, 94 U.S. 324, 338 (1877); Pollard's Lessee v. Hagan, 44 U.S. 212, 223, 229 (1845); Martin v. Waddell, 41 U.S. 367, 410 (1842).

105. "[W]hen the revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters, and the soils under them, for their own common use, subject only to the rights since surrendered to the general government." *Martin*, 41 U.S. at 410.

106. *See Pollard's Lessee*, 44 U.S. at 223, 229; *Shively*, 152 U.S. at 26-27, 49-50; *Barney*, 94 U.S. at 338; *Hardin*, 140 U.S. at 381-82.

107. *See* California v. United States, 438 U.S. 645, 654-55 (1978); Kansas v. Colorado, 206 U.S. 46, 94 (1907); United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690, 704-06 (1899). Apart from the constitutionally-based equal footing doctrine, Congress has authorized the states to exercise water rights authority over their internal waters. In the nineteenth century, Congress enacted several public lands and mining statutes, notably the Mining Acts of 1866 and 1870, 14 Stat. 251 (1866), as amended, 16 Stat. 217 (1871), 43 U.S.C. § 661, and the Desert Land Act of 1877, 19 Stat. (1877), 43 U.S.C. §§ 321-23, which provided for disposition of public domain lands to miners, homesteaders and others.

Second, the federal navigation power also limits the right of private water rights holders to claim property interests in navigable waters that are paramount to the public interest. According to the Supreme Court, the federal government's exercise of its navigation power does not give rise to claims for compensation under the Takings Clause by those whose rights are impaired by exercise of the power.[108] Since the federal government has a sovereign "servitude" in navigable waters, "the running water in a great navigable stream is [incapable] of private ownership," and hence no one can claim compensation for the loss of their rights.[109] The Court has since suggested, however, that the United States' exercise of its navigation power can result in an unconstitutional taking of property if the power is not adequately related to navigation.[110] The Court, which has breathed new life into the Takings Clause in other contexts,[111] may have done the same in the federal navigation context.

Thus, the federal navigation doctrine, as construed by the Supreme Court, is both a source of federal power and a limitation on such power. On the one hand, the doctrine assumes that navigable waters are linked to interstate or national interests, and therefore that the federal government has sovereign authority to regulate such waters. On the other hand, the doctrine also assumes that non-navigable waters are linked to local interests, and therefore that—except for the limited federal right to reserve water for use on federal

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These acts regulated water on such lands under the laws of the states. Thus, these acts protected the water rights on these former public domain lands from claims of the United States and its patentees. In *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935), the Supreme Court noted that these statutes collectively "effected a severance of all waters upon the public domain, not theretofore appropriated, from the land itself." *Id.* at 158. Therefore, the states have "plenary control" of their non-navigable waters. *Id.* at 163-64. The congressional "severance" of water from the public lands provides another basis, in addition to the equal footing doctrine, for state regulation and control of water rights.

108. *See* United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53 (1913); United States v. Twin City Power Co., 350 U.S. 222 (1955); United States v. Willow River Co., 324 U.S. 499, 502-03 (1945).

109. *See Chandler-Dunbar Water Power Co.*, 229 U.S. at 60; Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979).

110. *See Kaiser Aetna*, 444 U.S. at 170-80.

111. *See, e.g.*, Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992); Dolan v. City of Tigard, 512 U.S. 374 (1994).

lands[112]—the states have exclusive authority to regulate non-navigable waters. That is the clear import of Supreme Court decisions holding that the federal navigation power limits the states' sovereign interests in water under equal footing principles; the states' sovereign interests, which are reserved to them under the Tenth Amendment, remain intact to the extent they are not limited by the federal government's delegated powers, particularly its power to regulate navigation. Thus, the division between federal and state regulatory authority over water is based on the distinction between navigable and non-navigable waters; this distinction controls the balance between federal commerce interests and state equal footing interests in the context of water regulation. As the Supreme Court explained, "except where the reserved rights or navigation servitude of the United States are invoked, the State has total authority over its internal waters."[113]

B. *Expansion of Navigational Power Beyond Navigation Purpose*

Congress has adopted—and the Supreme Court has sustained—several major laws pursuant to the federal navigation power, some of which have regulated water for purposes other than navigation. These laws expand the federal navigation power beyond its original purpose of protecting navigation.

In the late nineteenth century, Congress adopted several acts to protect the navigability of the nation's rivers and harbors,[114] principally the Rivers and Harbors Act of 1899 ("the 1899 act"),[115] which authorizes the Army Corps of Engineers to prohibit obstructions in navigable waters. Under the 1899

112. Under the reserved rights doctrine, Congress has authority under the Constitution's Property Clause to reserve water for use on federal lands, and is deemed to exercise such authority when reserving lands from the public domain. *See* U.S. CONST. art. IV, § 3, cl. 2 (Property Clause); United States v. New Mexico, 438 U.S. 696 (1978); Cappaert v. United States, 426 U.S. 128, 138 (1976).

113. California v. United States, 438 U.S. 645, 662 (1978) (citing United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690, 709 (1899)).

114. *See, e.g.*, Rivers and Harbors Appropriations Act of 1896, ch. 314, 29 Stat. 234; Rivers and Harbors Act of 1894, ch. 299, 28 Stat. 363; Rivers and Harbors Appropriations Act of 1890, ch. 907, 26 Stat. 426; Rivers and Harbors Appropriations Act of 1886, ch. 929, 24 Stat. 329.

115. Rivers and Harbors Act of 1899, ch. 425, 30 Stat. 1151 (codified as amended at 33 U.S.C. §§ 401 *et seq* (2001)).

act, no person may create an "obstruction" to the "navigable capacity" of the nation's waterways, or deposit "refuse" in navigable waters, without a permit issued by the Army Corps of Engineers.[116] The 1899 act was adopted in response to the Supreme Court's decision in *Willamette Iron Bridge Co. v. Hatch*,[117] which held that no federal common law may preclude obstructions and nuisances in navigable waters, and thus federal courts cannot enjoin the construction of navigation-obstructing bridges that have been approved by local authorities. The 1899 act filled the void created by the *Willamette Iron Bridge* decision. In *United States v. Republic Steel Corp.*,[118] the Supreme Court broadly interpreted the Army Corps of Engineers' authority under the 1899 act, holding that the Corps has jurisdiction to regulate obstructions that impair potential navigation as well as actual navigation.[119] The 1899 act, of course, was adopted pursuant to Congress's power to regulate navigation because it expressly applied only to navigable waters and had the singular goal of protecting navigation.

In the early twentieth century, Congress, aware of its growing responsibilities for promoting the nation's economic development and prodded by two progressive presidents, Theodore Roosevelt and Woodrow Wilson, enacted two landmark pieces of legislation in order to utilize the nation's waterways for the advancement of national economic goals. The first act, the Reclamation Act of 1902 (the "Reclamation Act"),[120] promoted development of the West's arid lands, and the second, the Federal Water Power Act of 1920 (the "Power Act"),[121] promoted development of hydroelectric power. The Reclamation and Power Acts were similar to the Rivers and Harbors Act of 1899 in that they relied primarily, if not wholly, on the federal navigation power for their constitutionality. Unlike the 1899 act, however, the Reclamation and Power Acts involved purposes that were related, at most, only

116. Sections 9, 10, 33 U.S.C. §§ 401, 403 ("obstruction"); section 13, 33 U.S.C. § 407 ("refuse").

117. 125 U.S. 1 (1988).

118. 362 U.S. 482, 485-86 (1960).

119. *See id.* at 485-86.

120. Reclamation Act of 1902, ch. 1093, 32 Stat. 388 (codified as amended at 43 U.S.C. §§ 372, 383 (1986)).

121. Federal Water Power Act of 1920, ch. 285, 41 Stat. 1063 (codified as amended at 16 U.S.C. §§ 791(a)-793, 795-818, 820-820r (2000)).

tangentially to navigation.

The Reclamation Act of 1902 provides for federal construction and operation of reclamation projects that divert, store and distribute the waters of the western states for varied purposes—agricultural, flood control, navigation, and so forth.[122] In creating its reclamation program, Congress determined that important national interests were at stake, rejecting the view of those representatives of (mostly) eastern states, who argued that reclamation was a local rather than national function.[123] When enacting the Reclamation Act, Congress relied on its authority to regulate navigable waters under the Commerce Clause even though reclamation—which involves re-distribution of water for agricultural and other benefits—is a different and much broader goal than navigation.[124] Congress subsequently authorized individual reclamation projects pursuant to the umbrella authority of the 1902 acts, and these amendatory laws spelled out more clearly the comprehensive goals that Congress had in mind. For example, the congressional act authorizing California's Central Valley Project ("CVP")—the largest federal project authorized under the umbrella authority of the 1902 act—provides that the CVP's purposes are to provide irrigation water, improve navigation, control floods, prevent salinity intrusion, promote recreation, and protect and enhance fish and wildlife.[125] Thus, the Reclamation Act and its amendatory acts were adopted in part for navigation purposes, but more importantly, for non-navigation purposes as well. To lessen the intrusive impacts on the states' historic authority to regulate their water resources, the 1902 act provides that the federal projects authorized under the act are governed by state law; state law controls the "appropriation, use, or distribution" of water developed by the projects, and the Secretary of

122. *See generally* California v. United States, 438 U.S. 645 (1978); Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275 (1958).

123. *See* Roderick Walston, *Reborn Federalism in Western Water Law*, 30 HASTINGS L.J. 1645, 1647 n.8 (1979).

124. *See* United States v. Gerlach Live Stock Co., 339 U.S. 725, 736, 738 (1950).

125. *See* Rivers and Harbors Act of 1937, ch. 832, 50 Stat. 844; Rivers and Harbors Act of 1940, ch. 895, 54 Stat. 1198; *Ivanhoe*, 357 U.S. at 294; *Gerlach*, 339 U.S. at 731. *See also* Arizona v. California, 373 U.S. 546, 587 (1963) (holding that Boulder Canyon Project Act, 43 U.S.C. §§ 617 *et seq.*, which establishes federal projects on lower Colorado River, was adopted for multiple purposes of flood control, navigation, power generation, irrigation, and other purposes).

the Interior must "proceed in conformity with" such state laws.[126]

The Federal Water Power Act of 1920 was incorporated in the Federal Power Act of 1935,[127] and these acts (hereinafter collectively the "Power Act") provided for hydroelectric power development of the nation's waterways. The Power Act created a federal agency, the Federal Power Commission (now the Federal Energy Regulatory Commission), to regulate hydropower development in the nation's waterways.[128] The Commission is authorized to issue licenses for dams or other works for the "development and improvement of navigation" and for the development of "power" in any streams "over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States."[129] Under the Power Act, "navigable waters" are defined as those "over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States."[130] Since the Power Act defines "navigable waters" as co-extensive with Congress's authority to regulate interstate commerce, Congress evidently believed that it was acting pursuant to its commerce powers in providing for hydropower development in navigable waters. Like the Reclamation Act, the Power Act minimized the intrusion on the states' water rights authority by providing that state laws shall govern the "control, appropriation, use, or distribution" of water used in "irrigation or for municipal or other uses."[131]

Thus, Congress passed the Reclamation Act and the Power Act partially for navigation purposes, but also for other, broader purposes, such as irrigation, power, and so forth. These acts reflected a growing congressional recognition that much of the nation's economic development must be carried out by federal operational or regulatory programs, al-

126. *See* Reclamation Act of 1902, ch. 1093, § 8, 32 Stat. 388 (codified as amended at 43 U.S.C. §§ 372, 383 (1986)); California v. United States, 438 U.S. at 645.

127. Federal Power Act, 16 U.S.C. §§ 791(a)-793, 795-818, 820-820r.

128. *See id.*

129. 16 U.S.C. §§ 797(e), 803 (2000).

130. 16 U.S.C. § 796(8) (1994).

131. 16 U.S.C. §§ 802(b), 821 (1994). *See generally* First Iowa Hydro-Elec. Coop. v. Fed. Power Comm'n, 328 U.S. 152 (1946); California v. Fed. Energy Regulatory Comm'n, 495 U.S. 490 (1990).

though both acts contained savings provisions to protect the states' authority to manage their water resources. Nonetheless, the Reclamation Act and Power Act significantly altered the federal landscape in that Congress began to regulate navigable waters for broad national purposes unrelated to navigation. The question arose whether Congress, in enacting these landmark federal laws, had authority under the Commerce Clause to regulate waters for purposes that bore little, if any, relationship to navigation.

The Supreme Court answered this question by holding that Congress's power to regulate commerce in the nation's waterways extends beyond the interest of simply protecting navigation. In *United States v. Appalachian Electric Power Co.*,[132] the Court upheld the Federal Power Commission's authority to issue hydropower licenses under the Power Act even though such licenses had no navigation purpose. In that case, the lower courts determined that the waterway in question was not navigable and hence the Commission lacked jurisdiction to impose conditions unrelated to navigation.[133] The Supreme Court, examining the factual issue *de novo*, concluded that the waters—although not actually navigable—were "susceptible" of navigation through improvements that had yet to be made, and hence the waters qualified as "navigable" waters for Commerce Clause purposes.[134] Moreover, the Court reasoned, once the Commission had jurisdiction over "navigable" waters under the Commerce Clause, its constitutional reach is not confined strictly to navigation purposes but instead extends to other purposes, such as power production, flood control and watershed development.[135] The federal power to regulate navigable waters, the Court said, is "plenary" and "as broad as the needs of commerce."[136] The Court rejected the argument that the Tenth Amendment compels a different result, reasoning that the states, in forming the Union, delegated authority to the federal government to regulate interstate commerce and that this power encompasses the authority to regulate navigable waters.[137] There-

132. 311 U.S. 377 (1940).
133. *See id.* at 398.
134. *See id.* at 406-20.
135. *See id.* at 426.
136. *Id.* at 424, 426, 427.
137. *See id.* at 428-29.

fore, the Court held, the navigation power extends beyond the protection of navigation itself.[138]

The constitutionality of Congress's reclamation program was examined by the Supreme Court in *United States v. Gerlach Live Stock Co.*[139] There, the Court addressed the question of whether riparian water users could seek compensation from the United States for loss of their rights as a result of California's Central Valley Project. The United States argued that the federal reclamation program was adopted pursuant to Congress's authority to regulate navigable waters and that the United States need not pay compensation to those whose rights are impaired by exercise of this authority; no one has the right, the United States argued, to claim compensable property rights in waters that belong to the public.[140] The Supreme Court did not reach the constitutional question because Congress had provided in the Reclamation Act itself that compensation must be paid to those whose rights are impaired.[141] Nonetheless, the Court commented that Congress justifiably relied on its "navigation power" in enacting the reclamation laws "on the whole," and noted that certain "components" of the project were directly related to navigation.[142] The Court also noted, however, that the navigation effects of the projects are "economically insignificant" as compared with the values realized from "redistribution of water benefits,"[143] and declared that to the extent that the project benefits exceed the navigation purpose, they can be sustained under the General Welfare Clause of the Constitution.[144] It is

138. Subsequently, the Supreme Court briefly stated, without extensive analysis, that the Federal Power Commission has jurisdiction over non-navigable waters used to provide electricity transmitted across state lines. The court supported this conclusion by citing conventional Commerce Clause cases rather than navigation cases. *See* Fed. Power Comm'n v. Union Elec. Co., 381 U.S. 90 (1965). The *Union Electric* decision, which analyzed the federal government's jurisdiction over waters under its general power to regulate interstate commerce, appears inconsistent with the *Appalachian Power* decision, which analyzed the federal government's jurisdiction over waters based on their navigability.

139. 339 U.S. 725 (1950).

140. *See id.* at 731.

141. *See id.* at 737.

142. *See id.* at 736, 738.

143. *Id.* at 729.

144. *See id.* at 738 (citing U.S. CONST. art. I, § 8, cl. 1 (General Welfare Clause)). In subsequent decisions, the Supreme Court again cited the General Welfare Clause as the constitutional basis for the federal government's reclama-

doubtful that the Court today would rely on the General Welfare Clause in upholding the federal reclamation program or any other program, because such a broad, open-ended power to regulate the "general welfare" is tantamount to a federal police power, which the Supreme Court has unequivocally held that the federal government does not possess.[145]

Thus, as exemplified in *Appalachian Power* and *Gerlach*, the Supreme Court has not applied traditional Commerce Clause analysis in determining whether federal regulation of the nation's waterways is within the scope of the federal commerce power. Under traditional Commerce Clause analysis, the Court determines whether the regulated activity "substantially affects" interstate commerce, which, according to *Lopez* and *Morrison*, means interstate economic interests. In water regulation cases, however, the Court determines whether the regulated waters are navigable or have a reasonable nexus with navigability, and concludes that the federal commerce power applies if such a relationship exists. This distinction between different modes of Commerce Clause analysis—depending on whether the avenue of commerce is a waterway—derives principally from the Court's traditional deference to the states' sovereign authority to regulate their water resources under equal footing principles. That is, the Court, perhaps more in form than substance, has reaffirmed the states' sovereign interests in water regulation by holding that the federal commerce power applies only if federal navigability interests are somehow affected—even though the federal power may be asserted for purposes other than navigation.

Although the Supreme Court has never squarely held that Commerce Clause analysis is different in cases involving water regulation, this conclusion may also be inferred from

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tion programs. *See* Ivanhoe Irrig. Dist. v. McCracken, 357 U.S. 275, 294 (1958) (citing *Gerlach* for support that General Welfare Clause supports the Reclamation Act of 1902); Arizona v. California, 373 U.S. 546, 587 (citing *Gerlach* for support that General Welfare Clause supports Boulder Canyon Project Act, 43 U.S.C. §§ 617 *et seq.*). In *California v. United States*, 438 U.S. 645, 670 (1978), however, the Court did not mention the General Welfare Clause as the constitutional basis for the Reclamation Act of 1902 and implied that the Act could be sustained under the Spending Clause of the Constitution, U.S. CONST. art. 8, cl. 1 (stating that he federal government "preserved its authority to determine how federal funds should be expended").

145. *See, e.g.*, United States v. Lopez, 514 U.S. at 564-65; United States v. Morrison, 529 U.S. at 615-16.

the Court's routine description of its constitutional methodology. In *Lopez* and *Morrison*, the Court stated that the federal commerce power comes into play in three different types of cases—those involving the "channels" of interstate commerce, those involving the "instrumentalities" of such commerce, and those involving "activities" that "substantially affect" interstate commerce.[146] The Court has distinguished between cases involving the "channels" of interstate commerce—which would include navigable waters—and those involving "activities" that "substantially affect" interstate commerce, which do not necessarily involve navigable waters. Accordingly, the "substantially affects" requirement of the Commerce Clause apparently applies only to "activities" in navigable waters, but not to the "channels" of interstate commerce, such as navigable waters. Thus, the Court's own described methodology appears to recognize that Commerce Clause analysis is different depending on whether "channels" or "activities" are involved, which suggests that the analysis differs in cases involving the federal navigation power.

This conclusion, however, is not unequivocal. The Supreme Court on occasion has suggested that the federal power to regulate navigation should be viewed in traditional Commerce Clause terms, thus suggesting that the same constitutional analysis applies in both types of cases. In *Gerlach*, the Court relied on traditional constitutional principles—the General Welfare Clause rather than the Commerce Clause—rather than navigability as the basis for upholding the federal government's reclamation program.[147] In *Federal Power Commission v. Union Electric Co.*,[148] the Court appeared to rely on the federal government's general commerce powers rather than its navigation powers in upholding the Federal Power Commission's jurisdiction to regulate non-navigable waters used to generate electricity for transmission across state lines.[149] In *Sporhase v. Nebraska*,[150] a dormant Commerce Clause case, the Court held that water is an article of "commerce" within the meaning of the Commerce Clause, and therefore the right to transfer water in interstate commerce is

146. *See Lopez*, 514 U.S. at 558-59; *Morrison*, 529 U.S. at 608-09.
147. *See supra* note 144 and accompanying text.
148. 381 U.S. 90 (1965).
149. *See supra* note 138.
150. 458 U.S. 941 (1982).

governed by traditional Commerce Clause principles. And in *Kaiser Aetna v. United States*,[151] Justice Rehnquist wrote on behalf of the Court that

> [r]eference to the navigability of a waterway adds little if anything to the breadth of Congress' regulatory power over interstate commerce.... [A] wide spectrum of economic activities "affect" interstate commerce and thus are susceptible of congressional regulation under the Commerce Clause irrespective of whether navigation, or, indeed, water, is involved. The cases that discuss Congress' paramount authority to regulate waters used in interstate commerce are consequently best understood when viewed in terms of more traditional Commerce Clause analysis than by reference to whether the stream in fact is capable of supporting navigation or may be characterized as "navigable water of the United States."[152]

Justice Rehnquist supported this observation by citing the *Appalachian Power* case, which he construed as indicating that "congressional authority over the waters of this Nation does not depend on a stream's 'navigability.'"[153] In *Appalachian Power*, however, the Court upheld the Federal Power Commission's authority to issue a power license on grounds that the waters were navigable—even though it said the license could be issued for purposes other than navigation.[154] Thus, the Court in past cases appears to have held that navigability is the constitutional touchstone in determining whether the federal government has the right to regulate water, even though such regulation may extend beyond navigation. Indeed, Justice Rehnquist's opinion in *Kaiser Aetna* analyzed the federal regulatory power in terms of whether the waters had some link with navigability.[155] The distinction

151. 444 U.S. 164 (1979).

152. *Id.* at 173-74. Justice Rehnquist also cited traditional Commerce Clause cases in support of his conclusion, specifically *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), and *Wickard v. Filburn*, 317 U.S. 111 (1942). *See Kaiser Aetna*, 444 U.S. at 174. These cases, however, did not involve navigation or water regulation issues.

153. *Kaiser Aetna*, 444 U.S. at 174.

154. *See supra* note 135 and accompanying text.

155. *Kaiser Aetna*, 444 U.S. at 175-79. The *Kaiser Aetna* Court determined that the federal navigation power did not apply in that case because the regulated activity did not have an adequate nexus to navigation or navigability, and hence the property owner was entitled to assert a claim for an unconstitutional taking of property under the Takings Clause of the Constitution.

between navigable and non-navigable waters for Commerce Clause purposes may be, as Justice Jackson wrote for the Court in *Gerlach*, "highly fictional,"[156] but it is a distinction that the Court has commonly invoked and never directly repudiated.

C. *The Clean Water Act* & SWANCC

The article will now examine the constitutional basis of the Clean Water Act ("CWA"),[157] and how the Supreme Court in *SWANCC* interpreted that basis. The CWA establishes a federal pollution control program for the nation's waterways that is even further removed from the navigation concept than the Reclamation and Power Acts described above. The CWA's broad goal is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters,"[158] which is to be achieved by developing a "comprehensive long-range policy for the elimination of water pollution."[159] Thus, the CWA's goals are unrelated to navigation. Nonetheless, the CWA primarily applies only to navigable waters. Its specific goal is to eliminate discharge of pollutants into "navigable waters" by a certain date.[160] Under section 301, no one may discharge pollutants into "navigable waters" except as authorized by the act.[161] Such authorization is mainly provided in two major programs: (1) the National Pollutant Discharge Elimination System ("NPDES") established in section 402,[162] which prohibits the discharge of a pollutant from a point source into "navigable waters" without a permit issued by the Environmental Protection Agency, and (2) section 404,[163] which prohibits the discharge of any dredged or fill ma-

156. United States v. Gerlach Live Stock Co., 339 U.S. 725, 737 (1950).

157. 33 U.S.C. § 1251 (2001).

158. *Id.* § 1251(a).

159. S. REP. NO. 92-414, at 95 (1971), *reprinted in* 2 LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, Ser. No. 93-1, 93d Cong., 1st Sess. 1511 (1971). *See also SWANCC*, 531 U.S. 159, 179 (Stevens, J., dissenting).

160. The year specifically targeted was 1985. *See* 33 U.S.C. § 1251(a)(1) (2001).

161. *See* 33 U.S.C. § 1311(a) (2001) (prohibiting "discharge of any pollutant" without authorization). *See also* 33 U.S.C. § 1362(12) (2001) (defining "discharge of a pollutant" as addition of pollutant to "navigable waters" from point source).

162. *See* 33 U.S.C. § 1342(a)(4)-(b) (2001).

163. *See* 33 U.S.C. § 1344 (2001).

terials into "navigable waters" without a permit issued by the Army Corps of Engineers.[164] Thus, both the prohibitions and authorizations of the CWA apply to "navigable waters." The CWA therefore is reminiscent of the Rivers and Harbors Act of 1899, which described federal jurisdiction in terms of navigability.[165] Unlike the 1899 act, however, the CWA's purpose is not to protect navigation. Indeed, there is no inherent link between eliminating water pollution and protecting navigability.

The term "navigable waters" is defined in the CWA as "waters of the United States."[166] Thus, "navigable" waters are defined, paradoxically, without using the modifier "navigable." The legislative history provides an explanation for the apparent contradiction. Both the House of Representatives and Senate versions of the original bills defined "navigable waters" in terms of navigability, but the reference to navigability was dropped by the Conference Committee in order to ensure that the phrase "navigable waters" was "given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes."[167] Thus, Congress evi-

164. Under section 303, the states are mandated to establish water quality standards subject to the Environmental Protection Agency's approval. *See* 33 U.S.C. § 1313 (2001). Although some of these water quality standards apply only to "navigable waters," others, such as standards for "total maximum daily loads," apply to "waters within its [the State's] boundaries." *Id.* at § 1313(c)-(d).

165. *See supra* note 115 and accompanying text.

166. 33 U.S.C. § 1362(7) (2001). The Ninth Circuit, distinguishing *SWANCC*, recently held that "waters of the United States," as used in the CWA and applied to the NPDES permit program, include irrigation canals and other waters that are used to "exchange" water with navigable waterways, because such waters flow "intermittently" into navigable waters. *See* Headwaters, Inc. v. Talent Irrigation Dist., 243 F.3d 526, 533-34 (9th Cir. 2001). On the other hand, the Fifth Circuit, relying on *SWANCC*, recently held that the Oil Pollution Act of 1990, 33 U.S.C. §§ 2701 *et seq.*, which contains the same "navigable waters" definitions as found in the CWA, does not apply to discharges of pollutants into "intermittent" underground streams, where there was no showing that the intermittent underground streams were directly linked to surface navigable waters. *See* Rice v. Harken Exploration Co., 250 F.3d 264 (5th Cir. 2001).

167. *See* S. REP. NO. 92-1236, at 144 (1971). The Conference Committee accepted the version of the House Committee on Public Works, which had deleted the word "navigable" from the definition of "waters of the United States," and rejected the version of the Senate Committee on Public Works, which had included the word "navigable" in the definition. *See* William Funk, *The Court, the Clean Water Act, and the Constitution: SWANCC and Beyond*, 31 ENVTL. L. REP 10741, 10748 (2001). Representative John Dingell, explaining the reasons for the Conference Committee version, stated, "The new and broader definition is in

dently believed that its original definition—which contained the word "navigable"—might be construed as limiting the jurisdiction of federal agencies to less than what the Supreme Court had recognized in the past or might recognize in the future. As noted above, the Supreme Court has broadly construed the federal navigation power to extend, for example, to waters that are "susceptible" to navigation rather than actually navigable, to non-navigable tributaries, and even to federal objectives unrelated to navigation itself.[168] Thus, Congress meant to ensure that the courts, in construing the CWA, would not reduce its scope to less than what the courts had already decided regarding the scope of the federal navigation power. It is doubtful that Congress meant to wholly disregard the "navigable waters" limitation on the Corps' authority under section 404, for otherwise it would have deleted that limitation.

Two important consequences flow from this legislative history. First, Congress evidently believed that it was constrained by the limits of the federal navigation power in enacting the CWA, and that these limits were somehow relevant in defining the statutory terms of the CWA. Second, Congress intended that the limits of the federal navigation power would be construed broadly by the courts; Congress itself did not want to define these limits for fear of defining them too narrowly. In other words, the federal navigation power is relevant in determining the scope of the CWA, but that power is to be interpreted broadly rather than narrowly.

Based on this explanation of the legislative purpose, the *SWANCC* majority opinion appears correct in holding that section 404 limits the Army Corps of Engineers' jurisdiction to waters that are navigable or at least linked with navigability.[169] That is, the legislative history indicates that navigability—although to be defined broadly—nonetheless provides the touchstone for the Corps' jurisdiction under section 404.

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line with more recent judicial opinions which have substantially expanded that limited view of navigability—derived from the Daniel Ball case—to include waterways which would be 'susceptible of being used . . . with reasonable improvement' . . . ." HOUSE CONSIDERATION OF THE REPORT OF THE CONFERENCE COMMITTEE, *compiled in* 2 LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, Ser. No. 93-1, 93d Cong., 1st Sess. 250-51 (1973).

168. *See supra* notes 99-102, 131-38 and accompanying text.

169. *See SWANCC*, 531 U.S. at 166-74.

The dissenting opinion, on the other hand, appears incorrect in arguing that—since the definitional provision in section 502(7) does not include the word "navigable"—the Corps' jurisdiction under section 404 should not be limited to "navigable" waters.[170] The dissenting opinion appears inconsistent with Congress's intent that the navigation power, however defined, has relevance in measuring the Corps' authority under section 404. Indeed, the dissenting view would simply disregard the word "navigable" in section 404 altogether, thus reading out of the statute one of the specific terms limiting the Corps' jurisdiction. The majority opinion, on the other hand, by tying the Corps' jurisdiction to the "navigable waters" limitation appearing in section 404, gives meaning to this limitation and thus more faithfully construes the apparent will of Congress.

Turning to the constitutional question that *SWANCC* did not reach—but that guided its statutory analysis—the majority opinion appears to more closely follow the Supreme Court's jurisprudence regarding the federal government's power to regulate the nation's waters under its commerce powers. The majority opinion concluded that since the migratory bird rule has no nexus to navigability, the rule "alters the federal-state framework by permitting federal encroachment upon a traditional state power," thus raising "significant constitutional and federalism questions."[171] Since the Supreme Court has historically held that the federal navigation power is necessary to sustain federal regulation of water, the majority opinion correctly concluded that the migratory bird rule raises significant constitutional questions, assuming, of course, the continuing viability of the Court's precedents relating to the navigation power.

The *SWANCC* dissenting opinion, on the other hand, argued that the migratory bird rule raised no constitutional issues relating to the federal navigation power.[172] According to the dissenting opinion, the provision in section 404 restricting the Army Corps of Engineers' authority to "navigable waters" derived from a similar restriction in the Rivers and Harbors Act of 1899, and the latter act was adopted when "Congress's

170. *See id.* at 174-93 (Stevens, J., dissenting).
171. *Id.* at 173-74.
172. *See id.* at 174-97.

power over the Nation's waters was viewed as extending only to 'water bodies that were deemed "navigable" and therefore suitable for moving goods to or from markets.'"[173] The dissenting opinion errs in suggesting that the Court has rejected navigability as a measure of federal jurisdiction to regulate water. On the contrary, the Court's jurisprudence, as reflected in *Appalachian Power* and other cases, indicates that navigability continues to be a major constitutional touchstone, although, as noted above, this conclusion is not altogether free from doubt.[174] Therefore, the dissenting opinion's argument that navigability does not matter is one that, to date, the Court has not accepted. Although the Court has substantially broadened the navigable waters doctrine—by holding that the federal government can regulate navigable waters even for non-navigation purposes—the Court has never directly repudiated the doctrine itself. Even though the dissenting opinion described the navigable waters doctrine as "odd"[175]—just as Justice Jackson in *Gerlach* regarded it as "fictional"[176]—the doctrine is deeply rooted in the Court's jurisprudence and appears extant. Indeed, the fact that a majority of the *SWANCC* Justices believed that the assertion of federal jurisdiction over non-navigable waters "alters the federal-state framework by permitting federal encroachment upon a traditional state power" indicates that the majority continues to believe in the viability of the navigable waters doctrine.

D. *Comment on the Federal Navigation Power*

The navigable waters doctrine is both a source of federal power and a limitation on such power in that it authorizes the federal government to regulate essentially national interests

173. *Id.* at 181-82. (Stevens, J., dissenting). The dissenting opinion also argued that these earlier statutes "had the primary purpose of protecting navigation," while the CWA's goals "have nothing to do with *navigation* at all." *Id.* (emphasis in original). The dissenting opinion appears incorrect in stating that these earlier acts had the "primary" purpose of protecting navigation; although that was true of the Rivers and Harbors Act of 1899, it was not true of the Power Act, which, according to *Appalachian Power*, was adopted primarily for power purposes rather than navigation purposes. *See* United States v. Appalachian Elec. Power Co., 311 U.S. 377, 424, 426, 427 (1940).

174. *See supra* notes 146-56 and accompanying text.

175. *See SWANCC*, 531 U.S. at 182 (Stevens, J., dissenting).

176. *See supra* note 156.

in navigable waters but precludes federal regulation of essentially local interests in non-navigable waters. Thus, the doctrine assumes that the federal commerce power, in the context of water regulation, applies only to waters that are navigable, or at least have a nexus to navigability. The doctrine is somewhat incongruent with the Supreme Court's modern Commerce Clause jurisprudence, which holds that the federal power to regulate interstate commerce depends on whether the regulated activity "substantially affects" interstate commerce and that "commerce" refers to economic rather than non-economic activity.[177] Certainly an activity occurring in a waterway, hypothetically, may "substantially affect" interstate economic interests, even though the waters are not navigable and have no nexus with navigability. Thus, the federal government may be unable to regulate activities in navigable waters under its navigation power, even though a different conclusion would result under traditional Commerce Clause analysis.

As Justice Stevens observed in his *SWANCC* dissenting opinion, the navigable waters doctrine is the product of an earlier age of Commerce Clause jurisprudence, when the states were regarded as having virtually unlimited sovereign authority over their water resources subject only to the federal power to regulate navigation.[178] The Supreme Court has overturned much of its earlier Commerce Clause jurisprudence limiting the federal regulatory role. For example, in *Geer v. Connecticut*,[179] decided in 1896, the Court held that the states "own" their wildlife resources and therefore that regulation of such resources falls within the exclusive province of the states; in *Hughes v. Oklahoma*,[180] decided in 1979, the Court overturned *Geer* and ruled that the federal government may regulate wildlife resources under its commerce power. The Supreme Court, however, has never overturned its jurisprudence regarding the federal navigation power, either as a source of or limitation on federal power. Indeed, a majority of the *SWANCC* Justices appeared to believe that the navigable waters jurisprudence remains valid. This jurisprudence brings to mind Justice Holmes' observation that

177. *See supra* notes 70-88 and accompanying text.
178. *See SWANCC*, 531 U.S. at 178-79 (Stevens, J., dissenting).
179. 161 U.S. 519 (1896).
180. 441 U.S. 322 (1979).

the life of the law has been experience rather than logic.[181]

The navigable waters doctrine appears to have some value in defining the federal and state regulatory roles in our constitutional federalism. The doctrine recognizes that the states have traditionally regulated their water resources—subject, of course, to the federal navigation power—and that such traditional state regulation is based upon the United States' earliest constitutional foundations. If the doctrine did not exist, water would simply be one avenue of commerce that, for Commerce Clause purposes, is indistinguishable from other avenues of commerce, such as railroads, highways, and so forth. In that event, Commerce Clause analysis would afford no special weight or significance to the states' traditional authority to regulate their water resources; instead, the same constitutional analysis would apply irrespective of the avenue of commerce. As long as the states are regarded as having uniquely sovereign interests in regulating their water resources, there is some value in a constitutional doctrine that affords special recognition of these traditional state interests.

Nonetheless, a strict application of the navigable waters doctrine may make it difficult for the federal government to regulate truly national matters in the water context, thus undermining the foundations of the Commerce Clause itself. For example, the federal government has an important interest in reclaiming the West's arid lands and in promoting the development of hydroelectric power in the nation's waterways, interests that were sustained in *Gerlach* and *Appalachian Power*. If the federal government lacked authority to regulate navigable waters for purposes other than navigation, or if it lacked authority to regulate non-navigable waters no matter how compelling the national interest, the government would have lacked authority to adopt the reclamation and power programs that were sustained in *Gerlach* and *Appalachian Power*. The Court in those cases instead sustained the federal regulatory power by holding that such power extends beyond the protection of navigation, and perhaps can even be justified under general welfare powers that resemble a police power.[182] However important the national programs sus-

181. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (1881).
182. *See supra* note 144 and accompanying text.

tained by those decisions, the rationale of those decisions apparently would allow the federal government to exercise plenary authority over navigable waters for any purpose—and perhaps even police power authority over all waters—and thus would fundamentally alter the federal-state balance by changing the navigable waters doctrine to the point where it no longer serves its underlying purpose. These decisions, of course, were rendered during the post-New Deal era, when the Supreme Court viewed the federal commerce power as having virtually no limits, and are divergent from the Supreme Court's recent decisions in *Lopez* and *Morrison*, which have adopted a more modest view of the federal commerce power.

The navigable waters doctrine can be more closely integrated into the Supreme Court's traditional Commerce Clause jurisprudence in a way that allows the federal government to regulate what is truly national and preserves the states' authority to regulate what is essentially local. Under this integration, the navigable waters doctrine should not be regarded as establishing an absolute rule that the federal government has power to regulate navigable waters and lacks power to regulate non-navigable waters, but instead should be regarded as establishing only a *presumption* that the federal government has, or does not have, such powers. This presumption, of course, could be overcome by a showing that activities in non-navigable waters indeed have interstate effects. This presumption is consistent with the underlying tenet of the navigable waters doctrine, which historically was based on the assumption that the distinction between navigable and non-navigable waters comported with the distinction between interstate and local interests.

Several factors seem relevant in determining whether the presumption that the federal government cannot regulate non-navigable waters is overcome in individual cases. The most important factor is whether the federal regulation protects navigation interests (or related interests such as flood control or river management) rather than other interests. If the regulation protects navigation or like interests, the regulation is valid *per se*; although navigation interests may not be the most important in the arsenal of federal interests, they are at the core of the federal power to regulate water. Another factor—assuming that navigation interests are not

mainly involved—would be the nature and importance of the government interest. The courts commonly consider this qualitative factor in determining the scope of other federal constitutional powers; for example, the constitutionality of government regulation under the Due Process Clause, the Takings Clause, and the Equal Protection Clause of the Constitution[183] depends, in part, on the nature and importance of the government interest as balanced against other relevant interests.[184] This qualitative factor seems equally relevant in balancing the federal commerce power to regulate water against the states' traditional authority to regulate water under equal footing principles. Another factor would be whether the regulation was adopted directly by Congress, as in the case of the reclamation and power programs involved in *Gerlach* and *Appalachian Power*, or whether the regulation instead was adopted by an administrative agency without specific congressional direction, such as the migratory bird rule involved in *SWANCC*. Direct regulation by Congress is more likely to implicate national interests than administrative rulemaking. Indeed, the Supreme Court has distinguished between congressional directives and administrative actions in determining the validity of state laws in other federal-state water contexts.[185] Other factors would be those that the Supreme Court has applied, as in *Lopez* and *Morrison*, to determine whether the federal government has properly exercised its general commerce powers—for example, whether the regulated activities affect economic rather than non-economic interests,[186] whether the states have traditionally regulated the subject matter,[187] and whether Congress has adopted findings that apply constitutionally-permissible standards.[188] The difference is that in determining whether the federal government has properly exercised its commerce power in the con-

183. U.S. CONST. amends. V, XIV.

184. *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702 (1997) (Due Process Clause); Agins v. City of Tiburon, 447 U.S. 255 (1980) (Takings Clause); Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) (Equal Protection Clause).

185. *See* California v. United States, 438 U.S. 645 (1978) (holding that "congressional directives" adopted pursuant to Reclamation Act of 1902 override state water laws, but that administrative actions in the absence of such congressional directives do not).

186. *See supra* note 78 and accompanying text.

187. *See supra* notes 85-88 and accompanying text.

188. *See supra* note 81 and accompanying text.

text of water regulation, the analysis would start with the presumption that navigable waters are tied to national interests and non-navigable waters to local interests, a presumption that underlies the entire navigable waters doctrine. This approach, by establishing a presumption rather than an absolute rule, allows protection of truly national interests while preserving the states' historic authority to regulate water for local purposes. This approach, for example, would have allowed Congress's reclamation and power programs to be sustained on a less fictitious basis than was employed in *Appalachian Power* and *Gerlach*.

It is less likely, however, that the migratory bird rule at issue in *SWANCC* would survive this kind of inquiry. The rule was not adopted pursuant to the federal navigation power, and did not apply to navigation or like interests; indeed, the rule applied irrespective of whether the regulated waters were navigable or had any reasonable nexus with navigability. Additionally, the rule did not substantially affect interstate "commerce," because migratory birds generally have no effect on economic interests among the states. Also, the rule did not appear to be an important component of Congress's program to control water pollution; rather, the rule was adopted administratively—and only as a "clarification"—rather than as a direct part of Congress's regulatory program. Further, the rule was not supported by any administrative findings—much less congressional findings—indicating that the states were inadequately regulating wetlands and other areas frequented by migratory birds; although such findings are not conclusive in supporting the federal power, their absence undermines its necessity. Finally, the federal government has alternative constitutional powers, particularly the treaty power,[189] that allows federal protection of migratory birds in some circumstances if state regulation is deemed inadequate. For example, in *Missouri v. Holland*,[190] the Supreme Court upheld the constitutionality of a migratory bird treaty between the United States and Canada that overrode conflicting state laws, even though, the Court said, Congress could not have adopted the regulation under its commerce

189. *See* U.S. CONST. art. II, § 2.
190. 252 U.S. 416 (1920).

powers.[191] Thus, the migratory bird rule, as an exercise of Congress's commerce and navigation powers, does not stand on the same footing as the reclamation and power programs involved in *Gerlach* and *Appalachian Power*.

Therefore, the navigable waters doctrine can be integrated into traditional Commerce Clause analysis in a way that allows the federal government to regulate water for truly national purposes and retains the states' authority to regulate waters for essentially local purposes. As long as such integration is possible, there is no basis for concluding that the navigable waters doctrine fails to serve the national interest and should be overturned.

V. EFFECT OF *LOPEZ*, *MORRISON* AND *SWANCC* ON FEDERAL ENVIRONMENTAL LAWS

A. *Effect of* Lopez *and* Morrison

The Supreme Court's decisions in *Lopez*, *Morrison* and *SWANCC* may have a major impact on the constitutionality of Congress's environmental laws. In particular, *Lopez* and *Morrison* held that the federal commerce power applies only to activities that "substantially affect" interstate commerce.[192] Congress's environmental laws, on the other hand, generally have non-economic goals as their primary purposes, such as protecting and enhancing water quality, preserving and improving air quality, and preserving endangered species from extinction.[193] These congressional enactments often significantly restrict the use of private lands, thus diminishing the states' traditional authority to regulate land use.[194] Since *Lopez* and *Morrison* limit the federal commerce power in cases involving non-economic regulation and in matters traditionally regulated by the states, these decisions raise significant

191. *See id.* at 435.

192. *See* United States v. Lopez, 514 U.S. 549, 559 (1995).

193. Some major environmental laws that may be affected by *Lopez* and *Morrison* are the CWA, 33 U.S.C. §§ 1251-1387, the Clean Air Act, 42 U.S.C. §§ 7401-7671q, the Endangered Species Act, 16 U.S.C. §§ 1531-44, and the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601-75.

194. For example, the Endangered Species Act's prohibition against a taking of endangered species allows federal restrictions on land use activities affecting endangered species habitats. *See* 16 U.S.C § 1538(a)(1)(B); Babbitt v. Sweet Home Chapter of Communities, 515 U.S. 687 (1995).

questions whether Congress's environmental laws fall outside the Commerce Clause ambit.[195]

Certainly *Lopez* and *Morrison* raise questions concerning the validity, or at least rationale, of the Supreme Court's only decision that addresses the validity of federal environmental laws under the Commerce Clause. In *Hodel v. Virginia Surface Mining & Reclamation Ass'n*,[196] decided in 1981, the Court upheld the constitutionality of the Surface Mining Control and Reclamation Act ("SMCRA"),[197] which regulated surface coal mining operations. The purpose of SMCRA, according to its provisions, was to establish a "nationwide program to protect society and the environment from the adverse effects of surface coal mining operations."[198] Thus, the statutory purpose involved environmental and social needs, not commercial ones. SMCRA imposed several performance standards for surface coal mining operations, including a requirement that lands used for coal mining purposes must be restored to their prior condition after the mining operations were completed.[199] The Supreme Court held that the statute was a valid exercise of Congress's commerce powers even though it was adopted primarily for environmental and social purposes. Describing the federal commerce power in sweeping terms, the Court stated that Congress may regulate activities "causing air or water pollution, or other environmental hazards that may have effects in more than one State."[200] The Court also held that it must defer to congressional findings relating to an exercise of the commerce power if the findings are supported by a rational basis, and held that Congress's findings that surface coal mining has inter-

195. For a general discussion of this issue, see W. Funk, *supra* note 167 at 10765-71; Anna Johnson Cramer, Note, *The Right Results for All the Wrong Reasons: An Historical and Functional Analysis of the Commerce Clause*, 52 VAND. L. REV. 271 (2000); David A. Linehan, Note, *Endangered Regulation: Why the Commerce Clause May No Longer Be Suitable Habitat for Endangered Species and Wetlands Regulation*, 2 TEX. REV. L. & POL. 365 (1998); J. Blanding Holman, IV, Note, *After* United States v. Lopez: *Can the Clean Water Act and the Endangered Species Act Survive Commerce Clause Attack?*, 15 VA. ENVTL. L.J. 139 (1995).

196. 452 U.S. 264 (1981).

197. 30 U.S.C. §§ 1201-1328.

198. *Id.* at § 1202(a). *See Hodel*, 452 U.S. at 268.

199. *See* SMCRA, 30 U.S.C. §§ 1201-1328.

200. *Hodel*, 452 U.S. at 282.

state effects are supported by a rational basis.[201] The Court also reasoned that SMCRA was necessary to prevent the kind of "destructive interstate competition" that would result if one state were allowed to establish lower coal mining standards than other states,[202] which, in effect, would create a "race to the bottom" among the states in order to encourage the location of coal mining operations in their respective states. Thus, the *Hodel* Court appeared to suggest that Congress has virtually unlimited authority to regulate environmental matters under its commerce powers, as long as Congress determines that such regulation is necessary for valid environmental and social purposes.

Although *Hodel* is consistent with the Supreme Court's Commerce Clause analysis during the post-New Deal period, it appears inconsistent with the rationale in *Lopez* and *Morrison*. In *Lopez* and *Morrison*, the Court held that that the Commerce Clause applies only to activities that "substantially affect" interstate *economic* interests,[203] contrary to *Hodel's* holding that Congress has virtually unfettered authority to regulate environmental activities having little or no economic consequences.[204] In *Lopez* and *Morrison*, the Court held that deference cannot be accorded to congressional findings that a particular activity affects interstate commerce, unless the findings apply a constitutionally permissible standard in evaluating such effects.[205] This is contrary to *Hodel's* conclusion that deference must be accorded to congressional findings under a "rational basis" standard of review. Further, *Hodel's* reasoning that uniform national standards are neces-

201. *See id.* at 276. The Court noted that the congressional findings relating to SMCRA stated that many surface operations

> result in disturbances of surface areas that burden and adversely affect commerce and the public welfare by destroying or diminishing the utility of land for commercial, industrial, residential, recreational, agricultural, and forestry purposes, by causing erosion and landslides, by contributing to floods, by polluting the water, by destroying fish and wildlife habitats, by impairing natural beauty, by damaging the property of citizens, by creating hazards dangerous to life and property by degrading the quality of life in local communities, and by counteracting governmental programs and efforts to conserve soil, water, and other natural resources.

Id. at 277 (quoting from section 101(c), 30 U.S.C. § 1201(c)).

202. *See Hodel*, 452 U.S. at 281-82.

203. *See* United States v. Lopez, 514 U.S. 549, 559 (1995).

204. *See Hodel*, 452 U.S. at 281-82.

205. *See* United States v. Morrison, 529 U.S. 598, 614-16 (2000).

sary to avoid "destructive interstate competition" suggests that the states are incapable of adequately regulating a subject matter that they have traditionally regulated, which is contrary to *Lopez's* and *Morrison's* conclusion that some deference should be accorded to traditional state regulation. Thus, *Lopez* and *Morrison* suggest a much more rigorous judicial scrutiny of congressional environmental legislation than *Hodel*.

Nonetheless, many of Congress's environmental laws appear, at least on their face, to have a sufficient connection to interstate economic interests to be sustained under the federal commerce power. The Commerce Clause, as interpreted by the Supreme Court, does not require that the law's *primary* purpose be to regulate economic activity, or even that the regulated activity be of an economic nature; rather, it requires only that the regulated activity—whatever its nature—"substantially affect" interstate economic interests.[206] Thus, although the Commerce Clause literally authorizes Congress only to "regulate Commerce," the Supreme Court has held that Congress may regulate activities substantially *affecting* commerce, which is one step removed from commerce itself. Much federal environmental legislation appears to facially meet this somewhat looser standard. The CWA and the Clean Air Act ("CAA"),[207] for example, although primarily directed toward environmental protection, nonetheless regulate activities that may have significant economic interstate effects. Indeed, the catalyst for the CWA was a fire in Ohio's Cuyahoga River caused by oil pollution that destroyed ships and other property.[208] Further, the effects of water pollution can cross state lines, most obviously where the waters themselves cross state lines.[209] Similarly, the CAA pursues air quality goals that may affect economic interests crossing state lines; dirty air emitted from a factory in one state can easily cross into another state, causing serious public health

206. *See Lopez*, 514 U.S. at 559.

207. *See* Clean Air Act, 42 U.S.C. § 7401. *See generally* Hancock v. Train, 426 U.S. 167 (1976).

208. *See* SWANCC v. United States Army Corps of Eng'rs, 531 U.S. 159, 174 (2001) (Stevens, J., dissenting). *See generally* California v. Envtl. Prot. Agency, 426 U.S. 200 (1976).

209. *See, e.g.*, Milwaukee v. Illinois, 451 U.S. 304 (1981) (discussing water pollution crossing state lines); New Jersey v. New York, 283 U.S. 336 (1931) (discussing water pollution crossing state lines).

damage and resulting in a loss of economic productivity in both states.[210] Moreover, many federal environmental laws provide for significant state regulatory responsibilities, thus limiting the extent to which such laws intrude into traditional state regulatory functions. The CWA, for example, declares that the states have the "primary responsibilities and rights" to eliminate water pollution,[211] and provides that the states have primary authority for administering major programs adopted under the act, such as the NPDES permit program authorized in section 402.[212] Therefore, the CWA and CAA, as well as other federal programs modeled after them, appear facially to pass constitutional muster even after *Lopez* and *Morrison*.[213]

Although Congress's environmental laws may be facially constitutional, they may, of course, be unconstitutional as applied in individual circumstances.[214] In *SWANCC* itself, the Supreme Court held that the migratory bird rule promul-

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210. *See, e.g.*, Georgia v. Tenn. Copper Co., 206 U.S. 230 (1907) (air pollution crossing state lines).

211. *See* Clean Water Act, 33 U.S.C. § 1251(b).

212. *See id.* § 1342(b).

213. Several federal courts have sustained Congress's environmental laws against Commerce Clause challenges subsequent to *Lopez* and, in some cases, subsequent to *Morrison* as well. Indeed, no decision to date has invalidated an environmental law under the Commerce Clause. *See* Gibbs v. Babbitt, 214 F.3d 483 (4th Cir. 2000) (sustaining federal regulation under Endangered Species Act prohibiting "take" of reintroduced red wolves); National Ass'n of Home Builders v. Babbitt, 130 F.3d 1041 (D.C. Cir. 1997) (sustaining "take" provision of Endangered Species Act as applied to fly species); United States v. Olin Corp., 107 F.3d 1506 (11th Cir. 1997) (upholding constitutionality of retroactive liability under Comprehensive Environmental Response, Compensation and Liability Act); United States v. Bramble, 103 F.3d 1475 (9th Cir. 1996) (sustaining Eagle Protection Act); United States v. Hartsell, 127 F.3d 343, 348 (4th Cir. 1997) (sustaining federal regulation under CWA of discharge of pollutants into public sewers); United States v. Lundquist, 932 F.Supp. 1237, 1245 (D. Or. 1996) (sustaining Eagle Protection Act); United States v. Romano, 929 F.Supp. 502, 507-09 (D. Mass. 1996) (sustaining Lacey Act, 16 U.S.C. §§ 3371-78, which prohibits marketing in interstate commerce of fish and wildlife in violation of state law). *See also* Palila v. Hawaii Dep't of Land & Natural Res., 852 F.2d 1106 (9th Cir. 1988) (pre-*Lopez*/*Morrison* case sustaining federal regulation prohibiting state from adversely modifying endangered species habitat by maintaining sheep and goat populations).

214. *See, e.g.*, Babbitt v. Sweet Home Chapter of Communities, 515 U.S. 687, 709 (1995) (O'Connor, J., concurring) (arguing that the validity of federal regulation prohibiting habitat modification under the Endangered Species Act depends on "proximate cause" in terms of whether the habitat modification "foreseeably" affects endangered species); *id.* at 731 (Scalia, J., dissenting) (noting that statutes may be invalidated "as applied" even though facially valid).

gated under authority of the CWA raised constitutional difficulties, even though the Court did not suggest that the CWA itself raised such difficulties. Moreover, the migratory bird rule likely would have been constitutionally sustained if applied to traditionally navigable waters. By narrowly construing the CWA's statutory scope to avoid constitutional questions, *SWANCC* likely ensures that the CWA itself passes constitutional muster.

The Endangered Species Act ("ESA") presents more difficult constitutional questions, both facially and as applied, because the ESA appears to have a more tenuous connection to interstate commerce than other environmental laws, such as the CWA and the CAA. The ESA, according to its terms, was enacted to "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved."[215] Thus, the ESA makes no mention of any commercial purpose.[216] Moreover, although dirty water and dirty air can affect public health and economic productivity in different states, the loss of endangered species is less likely to have such interstate economic effects, particularly where the species is located in a single state and, by definition, is nearly extinct and therefore less likely to be connected with resources or activities in other states. Further, the ESA authorizes the imposition of several kinds of land use restrictions in order to protect endangered species, thus diminishing the states' traditional authority to regulate land use. For example, the ESA authorizes lands to be set aside as "critical habitat" for endangered species,[217] and authorizes the creation of conservation plans that limit land use in areas where such species are found.[218] In addition, the ESA makes it unlawful to "take"—meaning "harm"—an endangered species,[219] and a federal regulation provides that "harm" includes "significant habitat modification" that may adversely affect "essential behavioral patterns, including breeding, feeding or shelter-

215. Endangered Species Act, 16 U.S.C. § 1531(b).

216. The ESA, however, prohibits certain kinds of commercial activities, such as the importation of endangered species into the United States, the shipment in interstate or foreign commerce of such species, and the sale or offering of sale of such species in interstate or foreign commerce. *See* 16 U.S.C. § 1538(a)(E)-(F).

217. *See* 16 U.S.C. § 1533(b)(2).

218. *See* 16 U.S.C. § 1539(a)(2).

219. *See* 16 U.S.C. § 1538(a)(1)(B) ("take"); *id.* § 1532(19) ("harm").

ing."[220] Thus, the ESA significantly restricts land use in order to protect endangered species whose effects on interstate commerce are, at most, marginal.

To date, all federal court decisions, some of which were decided after *Lopez* and *Morrison*, have upheld the ESA and actions thereunder against Commerce Clause challenges, although some have inspired vigorous dissents.[221] Nonetheless, the rationale of some of these decisions may be inconsistent with the reasoning of *Lopez* and *Morrison*, which raises questions whether some federal actions pursuant to the ESA may be constitutionally sustained. This is not to suggest that the Supreme Court should, or should not, sustain the rationale of these lower court decisions as a proper explication of Congress's commerce powers; the point simply is that the rationale of these decisions may not be wholly congruent with *Lopez* and *Morrison*. Closer examination of a pair of the decisions will illustrate this point.

In *National Ass'n of Home Builders v. Babbitt* ("*NAHB*"),[222] the Court of Appeals for the District of Columbia Circuit upheld the Secretary of the Interior's authority to prevent a county in California from expanding a freeway intersection in order to provide access to emergency hospital emergency vehicles. The court reasoned that the Secretary had properly determined that the freeway intersection expansion would harm a small colony of flies—the Delhi Sands Flower-Loving Fly—that had been designated as "endangered" under the ESA. The court concluded, in a two-to-one decision, that the case was distinguishable from *Lopez* and *Morrison* because there was a reasonable nexus between the Secretary's regulation protecting the flies and interstate commerce.[223] First, the elimination of some or all endangered species would adversely affect "biodiversity," and thereby prevent such species from being developed to produce marketable products, such as those used for medicines and genes.[224] It is "not beyond the realm of possibility," the opinion stated, that the fly might someday inbreed with the hon-

220. 50 C.F.R. § 17.3 (1994).

221. *See supra* note 213 and accompanying text.

222. Nat'l Ass'n of Home Builders v. Babbitt, 130 F.3d 1041 (D.C. Cir. 1997).

223. *See id.* (Judge Wald wrote the main opinion, Judge Henderson wrote a concurring opinion, and Judge Sentelle wrote a dissenting opinion).

224. *See id.* at 1052.

eybee, thus producing a pollinator that is "more disease resistant."[225] In addition, the opinion stated, protection of the flies was necessary to prevent the kind of "destructive interstate competition" that would result if one state adopted less protective regulatory standards than other states.[226] The opinion also relied on the aggregation principle established in *Wickard*, stating that it was appropriate to aggregate minor incidents in order to conclude that such incidents, collectively, have a substantial effect on interstate commerce.[227] Finally, the opinion relied on the Supreme Court's earlier statement in *Hodel* that Congress may constitutionally regulate activities "causing air or water pollution, or other environmental hazards that may have effects in more than one State."[228] The dissenting opinion, on the other hand, argued that the Secretary's regulation protecting the fly colony had no effect on interstate commerce and interfered with the traditional authority of state and local governments to regulate land use.[229]

In another case, *Gibbs v. Babbitt*,[230] the Fourth Circuit, in another two-to-one decision, upheld a regulation adopted by the Secretary of the Interior that experimentally reintroduced an endangered species, the red wolf, into North Carolina and Tennessee. The regulation prevented anyone from "taking," or harming, the reintroduced wolves. The Secretary's regulation was challenged by private landowners who, wanting to protect their cattle from the predatory animals, argued that the Secretary's regulation exceeded the commerce power. Rejecting their argument, the majority held that the case was distinguishable from *Lopez* and *Morrison* because the Secretary's regulation was reasonably related to interstate commerce.[231] According to the court, the protection of the wolves had several distinctly economic effects of an interstate nature—such protection created a recreational industry that encouraged tourism and interstate travel, provided the basis for scientific research that generates jobs, and created the possi-

225. *Id.* at 1053.

226. *See id.* at 1054 (citing Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981)).

227. *See id.* at 1049.

228. *Hodel*, 452 U.S. at 282.

229. *Nat'l Ass'n of Home Builders*, 130 F.3d at 1060 (Sentelle, J., dissenting).

230. 214 F.3d 483 (4th Cir. 2000).

231. *See id.* at 492-98.

bility of renewed trade in fur pelts.[232] The court also applied *Wickard's* aggregation principle, holding that although the taking of an individual wolf would have minor interstate consequences, the entire class of activity regulated by the Secretary, taken as a whole, would have significant consequences.[233] Finally, the court stated that federal regulation of the wolves does not intrude into areas traditionally regulated by the states, because the Supreme Court had ruled that Congress has authority to regulate wildlife under its commerce powers notwithstanding claims that the states "own" such resources.[234] More broadly, the court stated that the ESA was based on need for uniform national standards governing the protection of endangered species, and that to defer to state regulation would "throw into question much federal environmental legislation" and would lead to "conflicting obligations" on businesses engaged in interstate activities.[235] The dissenting opinion, on the other hand, argued that the taking of red wolves did not constitute an economic activity, much less one having effects in other states.[236]

The majority opinions in *NAHB* and *Gibbs* do not appear to be consistent with the reasoning in *Lopez* and *Morrison*. As noted earlier, *Lopez* and *Morrison* held that the connection between gun possession near schools and gender-based violence, on the one hand, and national economic productivity, on the other, was too tenuous to provide a basis for Commerce Clause regulation. By the same token, the connection between red wolves and a local fly colony on the one hand, and interstate commerce on the other, would appear at least equally tenuous; in particular, the regulation of the singular fly colony in *NAHB* appears to have much less connection to interstate commerce than the activities involved in *Lopez* and *Morrison*. Moreover, *Gibbs's* reliance on certain economic consequences resulting from red wolf regulation—tourism, scientific research, and commercial pelt trade—suggests that the Secretary may lack authority to protect endangered species where these consequences are not present. Certainly the

232. *See id.* at 492-95.

233. *See id.* at 497-98.

234. *See id.* at 502 (citing Hughes v. Oklahoma, 441 U.S. 322 (1979)). *See also supra* note 180.

235. *See Gibbs*, 214 F.3d at 502.

236. *See id.* at 506 (Luttig, J., dissenting).

fly colony involved in *NAHB* had no effect on tourism or trade and little effect on scientific research. Thus, *Gibbs* itself may not be altogether congruent with *NAHB*. The *Gibbs* analysis suggests that the constitutional basis for ESA regulation may qualitatively depend on the species that is being regulated, in terms of whether, for example, tourists are likely to travel to the venue where the species is located. If so, ESA regulation may be highly problematic as applied to certain species in which tourists have little interest and that lack other commercial attributes, such as the Delta smelt that is located in California's Sacramento-San Joaquin Delta, whose protection by federal agencies under the ESA has substantially affected allocations of California's water supply.[237]

Other parts of the *NAHB* and *Gibbs* analyses seem even more divergent from *Lopez* and *Morrison*. Although both *NAHB* and *Gibbs* argued that uniform national standards are necessary for endangered species protection, the constitutional question, as posed in *Lopez* and *Morrison*, is whether the regulated activities substantially affect interstate commerce. The need for nationally uniform standards may be relevant in determining whether Congress has preempted state laws—assuming, of course, that it has constitutional power to do so—but, under *Lopez* and *Morrison*, is not relevant in determining the scope of Congress's constitutional power to regulate interstate commerce. Moreover, *NAHB's* fear that the states might engage in "destructive" regulation under non-national standards suggests a reluctance to defer to traditional state regulation that is contrary to *Lopez's* and *Morrison's* admonition that such deference must be constitutionally accorded. Additionally, *Gibbs'* and *NAHB's* reliance on *Wickard's* aggregation principle appears contrary to *Lopez's* and *Morrison's* reluctance to apply this principle in cases not involving economic regulation.[238] Finally, *NAHB's* argument that biodiversity among endangered species has marketplace implications seems particularly untenable because endangered species by definition are on the verge of extinction and thus unlikely to have significant commercial effects.

237. *See* Letter from U.S. Fish and Wildlife to Regional Director, U.S. Bureau of Reclamation (Mar. 6, 1995) (on file with author) (discussing the "Formal Consultation and Conference of Effects of Long-Term operation of Central Valley Project").

238. *See supra* note 82 and accompanying text.

Indeed, *NAHB* merely hypothesized that such implications might occur, thus engaging in speculative analysis of marketplace conditions that is inconsistent with *Lopez's* and *Morrison's* deference to state regulation.

Still, it is premature to suggest that the Supreme Court, even after *Lopez* and *Morrison*, will invalidate significant portions of the ESA or actions taken thereunder on constitutional grounds. First, the Court may decline to fully apply the rationale of *Lopez* and *Morrison* to environmental cases, particularly if the Court changes its rationale as its composition changes. Additionally, the Court, contemporaneously with *Lopez* and *Morrison*, has interpreted and applied the ESA without suggesting the presence of any constitutional difficulties.[239] For example, in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*,[240] the Court held that the ESA's prohibition against the "taking" of an endangered species is sufficiently broad to authorize the Secretary of the Interior to prohibit adverse modifications of endangered species habitats.[241] Since the Court simply interpreted the statute, it was not called on to address any constitutional issues. Nonetheless, the Court's failure to raise any constitutional questions on its own may suggest that it perceived no constitutional difficulties. Thus, it is difficult to predict how the Court will view the ESA and other environmental laws in future cases. These questions almost certainly will capture the Court's future attention.

B. *Effect of* SWANCC

The effect of *SWANCC* on administration of the nation's wetlands will depend on how broadly the decision is construed. Technically, the Supreme Court held only that the migratory bird rule is invalid.[242] Based on this narrow hold-

239. *See* Tenn. Valley Auth. v. Hill, 437 U.S. 153 (1978) (holding that section 7 of ESA precludes completion of federal dam because of predicted impact on endangered snail darter); Babbitt v. Sweet Home Chapter of Communities, 515 U.S. 687 (1995) (holding that ESA authorizes federal regulation prohibiting habitat modification); Bennett v. Spear, 520 U.S. 154 (1997) (holding that parties asserting economic interests have standing to challenge federal regulations adopted under ESA).

240. *Sweet Home*, 515 U.S. 687 (1995).

241. *See supra* note 214.

242. *See* SWANCC v. United States Corps of Eng'rs, 531 U.S. 159 (2001). "We hold that 33 CFR § 328.3(a)(3) (1999), as clarified and applied to peti-

ing, the Army Corps of Engineers and the Environmental Protection Agency have issued a guidance letter declaring that except where the Corps' jurisdiction is predicated solely on the migratory bird rule, the Corps' jurisdiction over all other "waters of the United States" remains intact.[243] The guidance letter, however, appears to construe *SWANCC* too narrowly. Although the Court struck down the migratory bird rule, it did so because the Corps lacks authority under the CWA to regulate "nonnavigable, isolated, intrastate waters."[244] Thus, the Court's decision precludes the Corps from exercising jurisdiction over waters lacking any nexus with navigability, not just waters inhabited by migratory birds. Hence, although *Riverside Bayview* held that the Corps may regulate wetlands adjacent to navigable waters,[245] *SWANCC* holds that the Corps may not regulate wetlands isolated from such waters. *SWANCC* thus significantly limits the Corps' authority to regulate wetlands under the CWA.[246]

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tioner's balefill site pursuant to the 'Migratory Bird Rule,' 51 Fed. Reg. 41217 (1986), exceeds the authority granted to respondents under § 404(a) of the CWA." *Id.* at 173.

243. *See* Memorandum from G. Guzy, General Counsel, EPA, and R. Andersen, Chief Counsel, Army Corps of Engineers (Jan. 19, 2001) (on file with author) (discussing the Supreme Court Ruling Concerning CWA Jurisdiction over Isolated Waters and noting that waters covered by the Corps' regulation that "could affect interstate commerce *solely* by virtue of their use as habitat by migratory birds are no longer considered 'waters of the United States'") (emphasis in original); Letter from Art Champ, Chief, Regulatory Branch, U.S. Army Corps of Engineers, Sacramento, California (Mar. 8, 2001) (on file with author) ("The only isolated waters that the Corps of Engineers will not continue to regulate are those isolated waters where the only interstate commerce connection is use by migratory birds.").

On the other hand, the Corps recently withdrew its claim that it has regulatory authority over a vernal pool located within a large ranch used for cattle grazing, although the Corps had asserted jurisdiction over the vernal pool earlier in the case. The Ninth Circuit concluded that the Corps had conceded that *SWANCC* "precludes Corps' authority over the vernal pool in dispute." Borden Ranch P'ship v. U.S. Army Corps of Eng'rs, 261 F.3d 810 (9th Cir. 2001).

244. *SWANCC*, 531 U.S. at 169-73.

245. *See* United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985).

246. The Association of State Wetland Managers initially estimated that if *SWANCC* is interpreted to allow regulation only of traditionally navigable waters and adjacent wetlands, only twenty percent of the nation's wetlands would remain subject to regulation under the CWA, although the percentage would be substantially higher if the concept of adjacency includes any wetlands within the 100-year floodplain (thirty to forty percent) and if the CWA extends to tributaries of navigable waters (forty to sixty percent). *See* W. Funk, *supra* note 167, at 10745. According to the association, only fourteen states currently regulate

Since *SWANCC* restricts the Corps' jurisdiction over wetlands, *SWANCC* may encourage the states to provide for more regulation of wetlands under their own laws. Indeed, *SWANCC's* stated assumption that the states are responsible for regulating isolated waters appears to invite the states to determine whether, and to what extent, they should directly regulate isolated wetlands. Although a relatively small number of states currently regulate wetlands,[247] this figure may rise as more states attempt to fill the regulatory vacuum over isolated wetlands. In California, for example, the Chief Counsel for the State Water Resources Control Board has suggested that California's regional water quality control boards should be authorized to regulate wetlands that are no longer subject to the Corps' jurisdiction.[248]

The impact of *SWANCC* extends beyond the Corps' authority over migratory birds or isolated wetlands. The decision broadly applies to virtually all of the CWA's regulatory scheme because the statutory scheme is largely predicated on regulation of "navigable" waters. The goal of the CWA is to eliminate discharge of pollutants into "navigable waters," and this goal is largely accomplished by prohibition of pollutant discharges into "navigable waters" except where specific authorization is provided; such authorization is provided, mainly, by the section 402 NPDES program and the section 404 dredge-and-fill program, both of which require permits for certain kinds of pollutant discharges into "navigable waters."[249] Thus, although *SWANCC* held only that the Corps may not regulate isolated waters or migratory birds under

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wetlands. *See id.*

247. *See supra* note 246.

248. *See* Letter from Craig Wilson, General Counsel, to State Water Resources Control Board (Jan. 25, 2001) (on file with author). Under California's Porter-Cologne Act, no person may "discharge waste" that could affect the "waters of the State" without obtaining a waste discharge permit from a regional water quality control board. *See* CAL. WATER CODE § 13260 (Deering 2001). The phrase "waters of the State" includes all surface water and groundwater "within the boundaries of the state." *Id.* § 13050. Thus, the Porter-Cologne Act, unlike the CWA, applies to *all* intrastate waters, including "isolated" waters. On the other hand, it is not clear whether the Porter-Cologne Act, in prohibiting unauthorized discharges of "waste," generally applies to activities affecting wetlands, which often do not involve "waste." The California Legislature may need to clarify whether the authority of state agencies extends to all activities in wetlands.

249. *See supra* notes 157-64 and accompanying text.

section 404, its reasoning supports the broader conclusion that the "navigable waters" limitation appearing in the CWA must be strictly read to preclude regulation of waters that are not navigable nor linked with navigability. Therefore, the provisions of the CWA limiting federal jurisdiction to navigable waters, particularly the section 402 NPDES program that is the heart of the CWA, are similarly circumscribed by the *SWANCC* decision. Neither the Environmental Protection Agency nor the Army Corps of Engineers has determined whether the waters broadly regulated by the CWA fall within the category of navigable or "nexus"-related waters, aside from the guidance letter arguing that *SWANCC* applies only to the migratory bird rule adopted under section 404. After *SWANCC*, the various regulatory programs established under the CWA may be subject to constitutional and statutory challenges to the extent they apply to waters without a nexus to navigability. Therefore, beyond its effect on wetlands, *SWANCC* has a potentially large impact on the regulatory programs established in the CWA.[250]

SWANCC may also affect regulation of endangered species under the ESA. The ESA regulates all endangered species regardless of their habitats, and thus does not distinguish between those that inhabit land and those that inhabit water. Although many endangered species, such as the red wolves and flies involved in *Gibbs* and *NAHB*, primarily inhabit land, other endangered species, such as fish species involved in past Supreme Court cases, inhabit water.[251] For en-

250. Paradoxically, the *SWANCC* decision, by reducing federal regulatory authority over discharges to non-navigable waters under the CWA, may have the effect of reducing state regulatory authority over such discharges as well. Section 401(a) of the CWA provides that any applicant for a federal license or permit that would authorize discharges into navigable waters must obtain a certification from state authorities that the discharge will comply with state water quality standards adopted under section 303 of the CWA. *See* 33 U.S.C. § 1341(a) (2001). *See also* PUD No. 1 of Jefferson County v. Wash. Dep't of Ecology, 511 U.S. 700 (1994). Since the Army Corps of Engineers lacks authority to regulate discharges to isolated waters under *SWANCC*, there is no occasion for the states to provide water quality certifications for such discharges under section 401(a). *SWANCC* does not, however, diminish the states' authority to regulate such discharges under their own laws. Indeed, section 510 of the CWA specifically preserves the "jurisdiction of the States with respect to the waters [including boundary waters] of such States." *Id.* § 1370.

251. *See, e.g.*, Tenn. Valley Auth. v. Hill, 437 U.S. 153 (1978) (discussing the endangered snail darter); Bennett v. Spear, 520 U.S. 154 (1997) (discussing the endangered Lost River sucker and Shortnose sucker).

dangered species found in water, the appropriate Commerce Clause inquiry suggested by Supreme Court precedents is whether the federal navigation power applies, which in turn depends on whether the waters are navigable or reasonably linked with navigable waters. Conversely, for endangered species found on land, the appropriate inquiry based on the Court's precedents is whether the regulated activities substantially affect interstate economic interests. Therefore, the appropriate constitutional inquiry may depend on which environmental medium is affected. This potential anomaly suggests once more the need for a more complete integration of the federal commerce power and the federal navigation power.

VI. CONCLUSION

The federal power to regulate navigable waters is an historic constitutional doctrine that does not fit neatly into the Supreme Court's modern Commerce Clause jurisprudence. The federal navigation power was developed when the states were thought to have virtually unlimited authority to regulate their water resources, subject only to the paramount federal power to regulate navigation. Under the Court's modern Commerce Clause jurisprudence, however, the federal government has broad authority to regulate commerce among the states, subject only to the limitation that the regulated activity must "substantially affect" interstate economic interests. Because of their historical differences, the federal commerce power and the federal navigation power may lead to anomalies depending on whether federal regulation applies to water or other mediums of commerce. The Supreme Court needs to squarely address these differences and reconcile them in a way that allows federal regulation of water resources for truly national purposes and that preserves the states' historic authority to regulate such resources for essentially local purposes. Ultimately, the courts rather than Congress are responsible for addressing and resolving these constitutional questions.